

The Search for Legitimacy in Constitutional Theory: What Price Purity?

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The occasion for this Symposium is the publication of two extraordinary books by two of today's most prominent constitutional theorists, Jesse Choper¹ and John Hart Ely.² The focus of the Symposium is the significance of these works for the current state and future of constitutional theory. In preparing to write this Article, I had an impulse, which I was able to control, of titling my contribution "Taking Constitutional Theory Seriously." I concluded that, aside from the concern of being viewed as too fashionable, such a title would have been perceived by the reader as presaging a defense of or attack on one theory, or as comparing the work of Professor Dworkin to that of other scholars. This is not my purpose. Instead, I would like to offer some observations on the phenomenon of constitutional theory itself. With special attention to Professor Ely's extremely important,³ powerful and entertaining book, I will explore the reasons why the calls for "theory"⁴ in constitutional law have been so profuse in recent years⁵—that is, why the search for new

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1. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980) [hereinafter cited as CHOPER].

2. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY].

3. The importance of Ely's book, in terms of the influence it will have upon the future development of constitutional theory and doctrine, is evidenced by the attention that it has already attracted. See, e.g., Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HAST. CONST. L.Q. 263 (1980); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). See also *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2853 (1980) (Brennan, J., concurring); *Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 100 S. Ct. 2844, 2886 (1980) (Rehnquist, J., concurring).

4. There are at least two major categories of constitutional theory that have been undertaken in recent years. One approach seeks to construct theories of judicial review, giving major attention to the role of the federal courts in the development of constitutional doctrine. In addition to the recent books by Professors Ely and Choper, some prominent examples of this approach include A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* (1976); L. LUSKY, *BY WHAT RIGHT?* (1975); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). A second approach to constitutional theory, while generally incorporating a particular conception of judicial review, is primarily concerned with the elaboration of substantive constitutional values. See, e.g., D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972). According to a leading constitutional scholar, the first category of theory is (and should be) assuming greater importance. Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817. It is this first category that will be the focus of this Article.

5. See, e.g., Agresto, *The Limits of Judicial Supremacy: A Proposal for "Checked Activism,"* 14 GA. L. REV. 471 (1980); Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Gunther *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U.L.Q. 817; Levinson, *The Constitution in American Civil Religion*, 1979 SUP. CT. REV. 123, 150; Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 131 (1978).

theories has become so intense. After examining the need for theory and discussing its role, I shall identify what I believe are some of the costs of theory in terms of the viability and vitality of constitutional law. In this context, I shall explore the phenomenon of theory in general, and analyze the particular theory advanced by Professor Ely. Through an assessment of the costs and benefits of theory, it should be possible to appreciate more fully the value of theory itself and, thus, to make some informed suggestions and assessments concerning the directions it should take in the future.

Much of what follows is based upon my own experience and growth in the dual aspects of my professional endeavor: as an observer of the development of constitutional law and as a teacher. It may be that many theorists too easily disassociate these roles from each other, if only subconsciously. In any event, the views I shall express in this Article have been importantly influenced by my experiences in teaching constitutional law as well as by the process of reflecting about some of my own prior writing. My perceptions of the need for and value of constitutional theory have changed considerably since my first exposure to the relevant issues at Harvard Law School.⁶ In part, this has resulted from my ability to learn from the work of such outstanding theorists as Professors Ely, Tribe, Michelman, Dworkin, Perry, Berger, Black, Bork, and others. But just as important, the evolution of my views has been affected by the intervening years of trying to introduce generally impressionable and often enthusiastic law students to the mysteries and magic of constitutional law and my perceptions of the effect that my focus on theory (or methodology) has had on their enthusiasm for the learning process and their ability to react to and evaluate the substantive product of constitutional doctrine. Thus, in an important respect, this Article will be autobiographical. Moreover, during the last five years, I have come full circle in my views on constitutional theory, and I am about to begin the circle anew. The ideas developed below have helped me recapture the sense of purpose and challenge I once had for these matters. Perhaps they may be similarly beneficial for academic colleagues who have become as skeptical and frustrated as I had with the seemingly elusive search for answers to problems we suspect—no, we know—are as intractable as they are complex.⁷

6. My own introduction to the role and dilemmas of constitutional theory took place under the auspices of Professors Ely and Richard Parker.

Some scholars have taken aim at what they have perceived to be a monolithic predisposition toward judicial "activism" or affirmative rights theory at Harvard. See, e.g., Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978). This observation may be somewhat exaggerated. While Harvard may not be able to match the point-counterpoint pairings of Yale's Fiss-Black and Bork-Winter, it can counter the Tribe-Michelman perspective not only with Professor Ely, but with the more enigmatic Richard Parker. See Parker, *Political Vision in Constitutional Argument—Part One: A Call for a New "Jurisprudence" of Constitutional Law* (February, 1979 draft) (forthcoming in HARV. L. REV.).

7. Professor Ely's brief account of the intellectual "Odyssey of Alexander Bickel" stands as a poignant reminder of how consensual our doubts really are. ELY, *supra* note 2, at 71-72.

I. THE NEED FOR CONSTITUTIONAL THEORY

*Some theory of our Constitution—more particularly, when we talk of judicial review, some theory of the appropriate constitutional role of an appointed judiciary in a government like ours—must be developed and defended unless we are content simply with a Court that grinds whatever political ax it prefers on a particular day.*⁸

If the business of constitutional law were commonly regarded as embodying a function as mechanical as that once suggested by Justice Roberts⁹ there would be little need for a theory of judicial review. Assuming for now that the language and meaning of the Constitution is clear, the judge's compliance with this task could be measured with relative ease, and the legitimacy of her conduct could be confidently assessed.¹⁰ The problem, of course, is that few observers accept such a model.¹¹ Almost everyone has by now come to accept the inevitable. The Constitution may generally mean what it says, but it often fails to say what it means. And even when agreement is reached with respect to what it says and means, we often ponder whether it should be taken to mean today what it meant yesterday and whether tomorrow's meaning must be the same as today's.¹² Some even believe that the Constitution isn't really all there for us to see—that it includes, by reference or otherwise, principles, norms, or whathaveyou that are written someplace other than in its text, or not written at all.¹³ Others have suggested, with considerable regret, that the written Constitution has become "irrelevant."¹⁴

A major reason for this debate, of course, is that the Constitution, in its

8. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978)(footnote omitted).

9. Justice Roberts' description of the judge's task was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former." *United States v. Butler*, 297 U.S. 1, 62 (1936).

10. Of course, this would depend upon the understanding that the judge had any business performing this task in the first place. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). If *Marbury's* critics are to be believed, see, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-14 (1962); ELY, *supra* note 2, at 3 & n.11; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975), a theory of judicial review is a *sine qua non* of any act of constitutional review.

11. The most prominent contemporary exception is Raoul Berger. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). Next in line, I suppose, would be Robert Bork. See Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

12. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 131-37 (1977); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Munzer & Nickel, *Does the Constitution Mean What It Always Meant?*, 77 COLUM. L. REV. 1029 (1977); Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations*, 4 U. DAY. L. REV. 305, 316-20 (1979).

13. For examples of those who believe that the Constitution is not confined to its writtenness, see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975) (arguing that the Court, aside from interpreting the written provisions, is also "the expounder of basic national ideals of liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution"); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAY. L. REV. 295, 300-01 (1979) (arguing for a "concept of human rights as the Unwritten Constitution"). The argument that most directly invokes the notion that the Constitution itself incorporates by reference certain unwritten rights is that which relies upon the ninth amendment. For a recent articulation of this view, see C. BLACK, *HOLMES LECTURE* (1979) (tentative draft).

14. Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 DRAKE L. REV. 1, 1 (1979-80).

major provisions regarding the definition, allocation, and limitations on government power, is quite general in its scope and delphic or ambiguous in its language—some would even say it is hopelessly so. We are thus faced with a dilemma: a court, in exercising the power of review in constitutional cases, must do what it is supposed to do—interpret. But it must *really* interpret, and that function can be somewhat more complex and sophisticated than Chief Justice Marshall first led us to believe. If the Constitution's words and phrases are not clear, there's always a danger of some mistake being made. And if the Constitution isn't even all there for judges to see, they must locate the unwritten elements before they can start interpreting. Thus perceived, the judge's role is not only one of an interpreter; she must be an explorer, or perhaps even a priest or prophet, to boot!

Even these problems would be less troublesome if there wasn't an almost universally felt need to place this process of interpretation within the confines of political theory. After all, there wouldn't be much fuss if we believed that the job description for the judge included the skills of prophesizing, exploring, etc. But at least on most accounts, it doesn't. We have a democracy, and democratic government is generally presumed to leave most of the job of legal exploration and prophecy to the people—at least when it comes to the definition and development of fundamental norms and values of governance. The written Constitution is clear on at least one point: federal judges, although selected from and by the people, are less accountable to the people than other government officials, or at least accountable in different ways.¹⁵ Thus, when judges engage in interpretation that looks to be creative, or at least relatively unconfined, there is some cause for concern. When creativity infects the law, it can result in a process that looks more like creation than discovery. But judges aren't supposed to be creators; they are interpreters of laws that the people have made (or as to which they have at least agreed).¹⁶ Thus, when it seems like they are creating law, we might suspect them of acting outside their allocated domain and, to that extent, illegitimately. And, as Professor Ely observes: "This, in America, is a charge that matters."¹⁷

As you might expect, however, even this problem is not quite as simple as it seems. Just as disagreement persists on what the Constitution involves

15. U.S. Const. art. III.

16. If judges are lawmakers, and if law is an entity whose content constantly changes, what prevents the justices of the Court from making constitutional law synonymous with their own conceptions of what is currently best for society? And if nothing prevents them, how can one reconcile this role for the Court with the notion that America is a democracy?

White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the "Lessons" of History*, 63 JUDICATURE 162, 164 (1979). Discussions of this problem pervade the scholarly literature. For particularly useful examples, see CHOPER, *supra* note 1, at 4-12; Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

17. ELY, *supra* note 2, at 5.

and whether judges create or discover law,¹⁸ there is no apparent consensus on the appropriate definition of democracy or its proper implication for the judicial role. Although most scholars accept the view that the Constitution does not define democracy in purely majoritarian terms, that's just about all upon which they agree. The debate is relentless on such issues as: whether the Court is better suited or equipped to impose democracy's self-defined limitations on majorities than the legislative branch;¹⁹ whether, granting the Court an active role in enforcing constitutional values, adequate political restraints are available to protect against abuse of judicial power;²⁰ and whether the notion of democracy itself is subject to change as time progresses. There is even considerable disagreement on whether the alleged antidemocratic character of judicial review is largely mitigated in light of the alleged antidemocratic characteristics of the legislative and executive branches.²¹ In the final

18. It is interesting to note that the creation-discovery problem has very close parallels outside constitutional law. For instance, in mathematics, there has long been a disagreement on whether mathematical propositions are invented or discovered. Although the question has proven quite as intractable as the one under discussion, it does not seem to have affected the practice of mathematical theory in as pervasive a way. See generally Calder, *Constructive Mathematics*, SCIENTIFIC AM., October, 1979, at 149.

19. Compare, e.g., Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1-17 (1979) and Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976) and Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952) and Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973) with J. ELY, *supra* note 2, at 43-72 and McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354 (1966).

The argument that the Court is the institution best equipped to enforce the constitutional limits on majoritarianism in individual rights cases is often referred to as the "functional justification" for judicial review. Its most forceful advocates today are Professor Choper, See CHOPER, *supra* note 1, and Michael Perry, whose forthcoming book, tentatively entitled THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (draft, 1980) presents an impressive articulation and powerful defense of this approach.

20. The most discussed mechanism for political restraint on the Court's power is Congress' power to control the jurisdiction of the federal courts. For arguments that this control is broad enough to ensure adequate political accountability, see, e.g., C. BLACK, HOLMES LECTURE 15-18 (1979) (tentative draft); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (draft, 1980). For critical responses to this argument, see ELY, *supra* note 2, at 46-47; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1306-08 (1970); CHOPER, *supra* note 1, at 53-55; Agresto, *The Limits of Judicial Supremacy: A Proposal for "Checked Activism,"* 14 GA. L. REV. 471, 486-87 (1980).

21. See, e.g., R. DWORKIN, TAKING RIGHTS SERIOUSLY 140-47 (1977); M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 17-25 (1966); Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977); Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint*, 54 CORNELL L. REV. 1 (1968). Professor Ely argues that this approach largely begs the point. Instead of taking the imperfections of the legislature as a license for performing its tasks, the Court should take action to ensure that the legislature acts with greater accountability, and thus more democratically. ELY, *supra* note 2, at 131-34. See also A. BICKEL, LEAST DANGEROUS BRANCH 18-20 (1962).

Although the problem of exactly what democracy is and how it should inform the roles that various governmental institutions play has received much attention elsewhere, see, e.g., J. PENNOCK, DEMOCRATIC POLITICAL THEORY (1979); PARTICIPATION IN POLITICS: NOMOS XVI (J. Pennock & J. Chapman eds. 1975), it has received surprisingly little attention in the literature on constitutional law. As Professor Bishin has observed, various commentators have often made certain assumptions about democracy upon which they have proceeded to base their perceptions of the judicial role. Bishin, *Judicial Review in Democratic Theory*, 50 S. CAL. L. REV. 1099 (1977). In this respect, Professor Choper's recent book makes an extremely important contribution to the current debate. Instead of basing his theory on conclusory assumptions, he analyzes not only underlying principles of democratic theory, but also compares the extent to which each of the branches of the federal government comports with these principles. CHOPER, *supra* note 1, at 12-59. He concludes that, on balance, "the Supreme Court is not as democratic as the Congress and the President, and the institution of judicial review is not as majoritarian as the lawmaking process. *Id.* at 58.

analysis, the debate about the compatibility of judicial review with democratic theory collapses back into an analysis of the nature and meaning of the Constitution itself.

Despite all of the contemporary debate, these issues were accorded relatively little concern and attention until the early 1900s. For a time, it was generally agreed that the Constitution was really quite specific and that judges in fact performed a rather mechanical function. Whether viewed in natural law terms or otherwise, the orthodox constitutional theory accepted the notion that the judge was able to find rules in the Constitution and apply them objectively to specific cases.²² Thus, the practice and theory of judicial review was perhaps not as controversial as it is today.²³ The emergence of legal realism, of course, changed all that. Realists attempted to expose all law as devoid of objectively discoverable and realizable principles and rules.²⁴ They rejected the possibility of finding, and thus the sensibility of seeking, transcendent or immutable concepts that could be said to form the basis of law, thus challenging the orthodox theory of law at its roots. Moreover, they believed that the notion of objective legal norms or values was fraudulent. Profoundly influenced by non-Euclidean developments in geometry and the increasing focus on the behavioral and social sciences, realism saw the judicial process as inherently and irrevocably intuitive and idiosyncratic.²⁵ Instead of reasoning deductively from established principles, cases were decided on the basis of hunches.²⁶ The judge was perceived as a social technician, manipulating and modifying precedents to accommodate the needs of each case.

Realist theory had profound and lasting implications for constitutional law. The view that law had no extra-political or unchanging basis and that law changed with the needs and values of a changing society struck at the heart of entrenched perceptions of the Constitution. Realism saw the natural law assumptions of the nineteenth century as charades. The Constitution, like other law, was essentially contentless; it could have no enduring meaning or

22. See, e.g., A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 14-16 (1970); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

23. To be sure, there were major disagreements on the proper techniques for constitutional adjudication. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (debate between Justices Chase and Iredell concerning the propriety of natural law and positivistic methodologies).

24. Perhaps the most comprehensive accounts of the development and impact of legal realism can be found in E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* (1973) and W. RUMBLE, *AMERICAN LEGAL REALISM* (1968). See also T. BENDITT, *LAW AS RULE AND PRINCIPLE* (1978); J. FRANK, *LAW AND THE MODERN MIND* (1930); G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 97-163 (1978); Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

25. There were, of course, some differences in approach among the leading academic realists. The discussion in the text is most clearly associated with extreme realists, especially Llewellyn and Frank. By and large, however, these views were quite commonly shared by the most prominent members of this school of thought. See generally Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

26. See, e.g., Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

substance beyond that given by a court in a particular case. Thus, the Constitution served neither as a real source for law nor as a restraint on the judicial decision. The only real restraint operating on the judge was the probability that her values would often be derived from or informed by the community itself.²⁷ This concept of the Constitution as intrinsically meaningless created important problems for democratic theory. To the extent that the unelected and life-tenured federal judiciary was not interpreting or bound by the Constitution, the justification for its exercise of political power was undermined and the legitimacy of judicial review was vitiated.²⁸

The dilemmas created by realist assumptions remain essentially unresolved. If the judicial decision is inherently subjective, what justifications exist for allocating important policy decisions to federal judges who are (at least relatively) unresponsive and unaccountable to popular will? And what of the notion that our government is one of laws, not of men? If the realist's tenets were accurate, and constitutional law is a largely personalized phenomenon, why should constitutional pronouncements by the courts be obeyed? In the search for adequate resolutions to these problems—resolutions that would preserve some meaningful role for judicial review—several approaches were taken. Attempts were made to justify judicial review by emphasizing the uniqueness of the judicial process, putting distance between the work of judges and that of legislators. But efforts to defend the judge's work as involving special craftsmanship²⁹ were largely question-begging and elitist. Similarly, calls for candor³⁰ threatened to exacerbate the realist dilemmas by starkly highlighting the subjective aspects of the judicial decision.

At the other extreme, efforts were made to defend judicial review by minimizing the occasions for its invocation. Thus, there was renewed interest in James Bradley Thayer's "rule of the clear mistake."³¹ As elaborated by Thayer, this approach would have either cast the courts in the role of "lunacy commissions sitting in judgment upon the mental capacity of legislators and, occasionally, of judicial brethren"³² or would have denied the courts any

27. E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY* 89 (1973).

28. The crisis of legitimacy was particularly severe for constitutional review by federal courts in view of the continuous debate over the historical basis for and wisdom of such judicial review. The legal realists challenged the very essence of the constitutional tradition—the assumption that judicial review, however undemocratic, was constrained by constitutional text, history, and precedent. Only the raw, unfettered exercise of powers by unelected judges remained.

Yudof, *School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court*, *LAW & CONTEMP. PROB.*, Autumn, 1978, at 67 (footnotes omitted).

29. Cf. L. HAND, *THE BILL OF RIGHTS* 77 (1958) ("From [law teachers] I learned that it is as craftsmen that we get our satisfactions and our pay.").

30. See, e.g., Powell, *Some Aspects of American Constitutional Law*, 53 *HARV. L. REV.* 529, 549–52 (1940). Calls for candor remain with us today. See Forrester, *Are We Ready for Truth in Judging?*, 63 *A.B.A.J.* 1212 (1977).

31. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129, 143 (1893) (the Court can invalidate a legislative act only "when those who have the right to make laws have not merely made a mistake, but have made a very clear one—so clear that it is not open to rational question").

32. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 808, 819 (1935).

power at all.³³ And to the extent that the Court was generally perceived as empowered to invalidate legislative acts that the Constitution seemed to forbid, abdication of its power was no more acceptable than was its unbridled use.

Out of the dilemmas of legal realism and the failure of early scholarly attempts toward their resolution emerged the search for more sophisticated constitutional theory. Modern scholarly and judicially created theories seek, in effect, to rebuild a basis of constitutional law that is sufficiently objective and stable to be taken as existing on its own but sufficiently flexible and organic to be adaptable to changing realities. In general, the theorist's duty can be described as constructing a framework for judicial decisions that will create the optimum balance between opposing conceptions of the judicial process. A theory must allow the judge to be more than a mechanic but less than a philosopher—more than a computer, but less than a priest³⁴—more than an historian but less than an oracle³⁵—and more than a mortal, but less than a god.³⁶ Additionally, a theory of judicial review must have its own roots in the Constitution. It must describe a role for the judge that was historically contemplated, by reference to an original understanding of the framers or otherwise.

If this task sounds somewhat quixotic, that may explain why theorists are often a frustrated lot.³⁷ Indeed, it may be that, as suggested recently by Professor Tushnet, no constitutional theory can perform adequately the role that it has been given.³⁸ It may also be that constitutional theory as now conceived and practiced creates certain risks for the Constitution itself—that in seeking to perform its impossible mission, it threatens to undermine the

33. The sterility of Thayer's formulation is perhaps best demonstrated in its apparent influence on the extremely deferential rationality standard often invoked in "economic" due process and equal protection analysis. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 35-46 (1962). For a general discussion and critique of the rationality standard, see Bennett, "Mere" Rationality in Constitutional Law: *Judicial Review and Democratic Theory*, 67 CAL. L. REV. 1049 (1979).

34. Compare Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196 (1977), with D'Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977).

35. See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

36. In his construction of a model of the judicial process for "hard cases," Professor Dworkin created the mythical judge Hercules. Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975), reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977). One focus of Dworkin's numerous critics has been to suggest that even if the separate steps of Hercules' analysis were internally rational and coherent, they are useless for the real world of adjudication if they can be followed only by a god. See, e.g., Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1043 (1977); Note, *Dworkin's "Rights Thesis"*, 74 MICH. L. REV. 1167, 1178 (1976).

The suggestion that judicial review entails a prophetic-like function has not been uncommon in constitutional scholarship. For one of the most sophisticated and powerful arguments of this sort, see M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (draft, 1980). See also Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123.

37. Again, I refer the reader to Professor Ely's description of Professor Bickel's career. ELY, *supra* note 2, at 71-72.

38. Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1057 (1980).

role that the Constitution is expected to play in our society. After proceeding, in the next section, to elaborate more fully certain commonly held perceptions of the role of constitutional theory, I will turn to an examination of some of these risks.

II. THE ROLE OF CONSTITUTIONAL THEORY

*If a principled approach to a judicial enforcement of the Constitution's open-ended provisions cannot be developed . . . responsible commentators must consider seriously the possibility that courts simply should stay away from them.*³⁹

In this statement, Professor Ely has given us both a description of the role of constitutional theory as well as a reminder of the serious consequences many theorists attach to the success of their work. Although theory seeks to build a "principled" structure for constitutional decisionmaking, it also aims for more.⁴⁰ In constructing constitutional theories, scholars seek to structure models of decisionmaking that explain and justify the power and practice of judicial review—particularly, the practice of the Supreme Court in reviewing the decisions of state and federal legislative, executive, and administrative bodies for the purpose of determining their constitutionality.⁴¹ A serious

39. ELY, *supra* note 2, at 41.

40. The search for "principled" methods is often traced back to Professor Wechsler's call for "neutral principles." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). At the core of Wechsler's theory was the proposition that constitutional cases had to be decided according to values "transcending the immediate result that is achieved." *Id.* at 15. By constructing and applying such principles, the Court would be avoiding the "deepest problem of our constitutionalism," *id.* at 1, namely, the *ad hoc* evaluation of legislative judgments based on the judge's personal views of wise social policy. For Wechsler, the Court's failure to meet this requirement undermined the legitimacy of *Brown v. Board of Educ.*, 347 U.S. 483 (1954), because, aside from the principle of freedom of association, no principle of sufficient neutrality and transcendence existed to justify the decision. The associational principle itself was violated by preferring the interests of blacks over those of whites. Wechsler's theory has since been viewed as fundamentally incomplete because of its inability to define the content of neutral principles and its lack of usefulness in eliminating many non-trivial values from the permissible scope of constitutional debate. *See, e.g.,* ELY, *supra* note 2, at 55.

While Wechsler's conception of the theory of neutral principles has been widely criticized, *see, e.g.,* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960); *but see* Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982 (1978), the notion that a judicial decision must be "principled"—that is, based upon nonarbitrary distinctions between the case at hand and others similarly situated—has been universally endorsed. *See, e.g.,* ELY, *supra* note 2, at 54–55; Richards, *Rules, Policies and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication*, 11 GA. L. REV. 1069, 1086 (1977) (Wechsler's theory is "not the whole truth, but . . . an important part of it."). *See generally* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

41. In his recent book, Professor Choper defines his goal as seeking "to advance a principled, functional, and desirable role for judicial review in our democratic political system." CHOPER, *supra* note 1, at 2. Professor Tushnet has written that "[t]he focus of constitutional theory is defining and justifying a role for the Supreme Court in society as we find it. . . ." Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1044 (1980). Professor Philip Heymann and Douglas Barzelay, commenting on the role of constitutional theory in the context of the abortion issue, wrote of seeking a conceptual framework for judicial review which best answers the following questions:

[W]hat framework gives the appearance of most restricting the Court's embarrassing power; what framework really restricts that power most; what framework gives the states most freedom; which gives most guidance to state officials and lower courts; what gives most protection to deeply held societal values; and what framework is most manageable for the Court itself to apply with limited resources. The choice is not easy, but it must be made if the Court's actions are to be consistent with its justifications.

Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765, 783 (1973).

theory will have at least two major objectives. First, it will seek to preserve the centrality of the Constitution as the source of guiding principle in the structuring of governmental institutions and the evaluation of government policy. Second, it will limit, to the maximum extent, the potential for subjective value choices by those invested with judicial power. Those objectives are equally informed by the assumption that purely objective or absolute values are inconsistent with the inherent nature of our written Constitution; that they are incompatible with fundamental realities of human psychology as it relates to the judicial process; and that they are hostile to the historic function and dynamics of constitutionalism itself. In seeking to achieve these objectives, many theorists have proceeded defensively. There has been a pervasive assumption, often bordering on paranoia, that the integrity and acceptability of proffered methodologies will vary in inverse proportion to the substantive content—the moral quotient—of the outcomes that they allow. In this sense, the reaction to realism and its perceived assault on core assumptions about democratic theory persists.

For a time, only extreme solutions seemed acceptable.⁴² If the judicial process could not be purged completely of discretion—if it could not be rendered objectively pure—it could not be justified. As thus conceived, the animating purpose of constitutional theory has been to neutralize constitutional doctrine of its moral content by restraining the range of judicial choices that could be regarded as legitimate. The success of its practitioners has been measured not so much by their ability to delineate the range and depth of values properly invocable in constitutional argument, but by their ability to point to those that are not.⁴³

In recent years, the quest for better constitutional theory has become especially frenetic. With its first full decade behind it, the Burger Court has been perceived as at least selectively disengaging itself from the Warren Court's vigorous involvement in the resolution of pressing social problems. Academic commentators who are dissatisfied with what they see as the Burger Court's insensitivity to fundamental notions of justice and fairness—

42. See, e.g., Hand, *The Contribution of an Independent Judiciary to Civilization* in *THE SPIRIT OF LIBERTY* 159-65 (1942).

Professor Bork, one of the most influential contemporary theorists arguing for a very modest judicial role, has written:

Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights. . . . [W]here the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute. That, by definition, is an inadequate basis for judicial supremacy.

Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 8, 10 (1971).

43. I have been struck by the extent to which many theorists feel obliged—sometimes, it has seemed, to the point of straining—to point to the moral conceptions that their theories could not encompass. It is as if a theory's inability to protect certain values—which its architect assures us he holds with deep personal conviction—amounts to a seal of legitimacy. See, e.g., ELY, *supra* note 2, at 158 n.75 ("I think women should be drafted if anyone is, and I think under appropriate financial circumstances they should be as liable as men to an alimony order. I just don't think either distinction is unconstitutional.").

as well as the general political malaise and fragmentation that has inhibited enlightened legislative action—are struggling to persuade the Court to assume a more activist stance. These commentators know that their credibility will largely depend on their success in constructing theories that are modest in scope: the present Court seems more sensitive than its predecessor to the dilemmas of its role. Other commentators applaud the Burger Court's relative restraint. Recognizing that the composition of the Court will soon undergo substantial change, they will seek to develop theories that defend and encourage continued restraint.

Given these realities, it seems an especially propitious moment to reconsider carefully the underlying role of theory in the development of constitutional law. In the next section, I will identify some problems that the traditional approach to theory has raised. In particular, I will argue that some recent attempts to develop better constitutional theory may prove costly to the ability of the Constitution to perform its most central functions.

III. THE COSTS OF THEORY

*A shift in emphasis to the Constitution itself suggests an alternative approach to legitimacy which, however old-fashioned, may nonetheless be apt. If the Constitution is seen as substantive law, as a translation of certain values into rights, powers, and duties, then it may be possible to justify constitutional adjudication not by its method but by its results. Decisions are legitimate, on this view, because they are right.*⁴⁴

The conservative and restraining influence of theory has become a matter of increasing scholarly and judicial concern. In some quarters, there is a growing realization of the costs associated with models of constitutional review that closely tie judgments of value to a narrow reading of the constitutional text. In this regard, Oregon Supreme Court Justice Linde has noted:

What must ultimately be reconsidered in both criticism and adjudication is the relationship between the Constitution and judicial review. Because constitutional scholarship has remained consistently preoccupied with the institutional concerns of the judicial process, it sees constitutional law as composed of questions about what judges should do, not what government should do. The effect is to treat constitutional law as a consequence of judicial review, rather than vice versa.⁴⁵

Similarly, Professor Tribe has observed that, in recent years, "many of the most prominent, and most skillful, constitutional theorists treated the question of legitimacy of judicial review as itself the central problem of constitu-

44. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 52 (1978).

45. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 251 (1972). Linde has more recently restated this concern. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 207 n.25 (1976). He observed that "by 1936 half a century of preoccupation with judicial review had reversed what was premise and what was consequence in constitutional law." At the same time, however, he also observed: "As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours . . . it is to serve many generations through changing times." *Id.* at 254.

tional law."⁴⁶ Professor Kenneth Karst has advanced this concern on several occasions. In 1977, writing in the *Harvard Law Review* of his perceptions of the central substantive value of equal protection, he noted critically "the gap between results and articulated theory," a gap that was "unusually wide," responsibility for which "must be shared by the Court and its commentators."⁴⁷ He went on to observe:

It is curious, after all these years, that so much of the discussion of equal protection doctrine has continued to proceed in a substantive void. The predominant concern, both of the Burger Court and of a strikingly large proportion of modern equal protection commentary, has been with issues of judicial role and methodology, rather than the substantive content of the equal protection clause. Indeed, the search for a "central guiding principle" seems to have been inhibited by a widely shared assumption that the equal protection clause lacks substantive content. That assumption is mistaken.⁴⁸

In his subsequent work, Professor Karst has restated this concern. Writing jointly with Professor Horowitz on *Bakke*,⁴⁹ Karst viewed Justice Powell's opinion⁵⁰ as effecting a "doctrinal end run."⁵¹ In criticizing Powell's invocation of "strict-scrutiny" equal protection analysis, he observed that "Justice Powell's opinion exemplifies the way in which standard-of-review analysis of equal protection cases has become a blind alley,"⁵² and that "the

46. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 47 (1977). For a review of some of the literature and a general critique of the constraining aspects of constitutional theory, see Wisotsky, *Beyond Legitimacy*, 33 U. MIA. L. REV. 173 (1978). For the views of a prominent Englishman concerning the extreme American preoccupation with the judicial role, see Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977).

47. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 1-2 (1977).

48. *Id.* at 3-4 (footnotes omitted).

It is interesting to note that even the most value-sensitive of contemporary theorists feel it necessary to go through the rites of structuring sophisticated methodological constructs before offering their substantive proposals. See, e.g., Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1032-33 n.47 (1979). In fairness to Professor Perry, I note that much of his methodological emphasis was relegated to footnotes. Moreover, much of his article *does* focus on the substantive values of equal protection, and he often proposes his suggested resolutions as justifiable notwithstanding one's choice of "standards of review." *Id.* at 1048.

In this respect, I should also note my own participation in this methodological paranoia. In a recent article, Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 185-92 (1978), I argued that the Court's elaboration and protection of dignitary values in procedural due process contexts is not only morally imperative, but is consistent with a modest judicial role. I concluded my observations by saying:

In this sense, the Court's recognition of the fundamental relationship between individual dignity and stability, and its development of a procedural due process methodology flexible enough to confirm and nurture values of personal integrity, autonomy, and self-respect, would be consistent with the highest tradition of judicial modesty and restraint. *The concomitant facilitation of a more just social order can be treated, if it must, as an incidental benefit.*

Id. at 195 (emphasis added). The views expressed in the present Article have, in large part, been influenced by my lingering dissatisfaction with the sense of obligation I felt to camouflage my strong feelings of substantive values in methodological garb. I shall return to this point shortly.

49. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

50. *Id.* at 269 (Powell, J., opinion announcing the judgment of the Court).

51. Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 9 (1979).

52. *Id.* at 22.

notion of substantive values in the equal protection clause plays no part in his analysis."⁵³ Noting that highly-methodological approaches to equal protection problems are ultimately subject to manipulation,⁵⁴ Karst called for more candor and sensitivity in the analysis of claims of individual rights. Although (subsequently) endorsing the view that constitutional review demands the development of a "principled approach to judicial enforcement of the Constitution's open-ended provisions,"⁵⁵ Karst concluded: "If its decisions are to be seen as principled, the Court must explain its principles as elaborations of substantive values in the Constitution. What is needed, then, is not further refinement of judicial methodology, but clear statement of the substantive meaning of equal protection."⁵⁶

The concern expressed by Professors Tribe, Karst, Horowitz, and others⁵⁷ is one which I share. The continuing search for better constitutional theory, with the concomitant elaboration and refinement of increasingly sophisticated and complex methodological frameworks, although admittedly important and valuable,⁵⁸ has assumed a brooding omnipresence of its own. The eternal quest for the ideal judicial role—the growing preoccupation with "processes of decisionmaking"⁵⁹—has had a profound influence on our

53. *Id.*

54. "Perhaps the most telling criticism of our present equal protection theory can be summarized in a question that is none the worse for being rhetorical: Can anyone seriously argue that Justice Powell or the Justices of the Brennan group would have voted differently if each had been required to decide within the framework of the other's standard of review?" *Id.* at 22.

It is apparently the fate of all constitutional theories to be subject to this criticism. Already, the observation has been made with regard to Professor Ely's "representation-reinforcing" theory of judicial review. See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). See also Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1036 (1977), criticizing R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962), criticizing the "interest balancing" approach to first amendment adjudication.

55. Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624, 665 (1980), citing Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 448 (1978).

56. Karst & Horowitz, *The Bakke Opinion and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 24 (1979). Professor Karst has elaborated on this theme in the context of articulating values underlying claims of intimate association and calling for courts to engage in a "careful evaluation of the values at stake" in cases raising such claims. Karst, *Freedom of Intimate Association*, 89 YALE L.J. 624, 651 (1980).

57. See, e.g., Wright, *Judicial Review and the Equal Protection Clause*, 15 HARV. C.R.-C.L. L. REV. 1, 20 (1980); Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

58. I will address the important and special value of theory a bit later. See Section IV, *infra*.

59. Perhaps the triumph of process over substance is best illustrated by the publication of Professor Brest's remarkable casebook "premised on the belief that an explicit focus on the processes of constitutional decision-making offers an understanding of the structure, operation, and doctrines of the American constitutional system that the conventional organization cannot provide." P. BREST, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING: CASES AND MATERIALS* 1, 3 (1975). Similarly, Professor Choper's recent book is devoted to advancing "a principled, functional, and desirable role for judicial review in our democratic political system." CHOPER, *supra* note 1, at 2. Thus, Choper sets as his "principal task" the examination of "the jurisdictional or procedural aspect of the role played by the Supreme Court and judicial review in our democratic society," focusing on the question of "whether the Court should adjudicate certain constitutional issues" instead of on "how the various provisions of the Constitution should be interpreted." *Id.* at 70-71. Choper argues that the Supreme Court is best suited and most entitled to "guard against governmental infringement of individual liberties secured by the Constitution." *Id.* at 64, (the "Individual Rights Proposal") and is less suited and needed to mediate disputes between Congress and the President (the "Separation Proposal") as well as the grievances

conception of the Constitution as a vehicle for facilitating the evolution of moral growth in our society as well as impacting on the ability of the Constitution to act as a legitimating and stabilizing force.⁶⁰ In the remainder of this section, I will elaborate on this concern. I will focus on a major and often unrecognized cost that has attended the preoccupation with theory and its

of the states vis-à-vis the national government (the "Federalism Proposal"), both of which should be found nonjusticiable. Although he contends that the Court's special function of protecting individual rights extends beyond "keeping the political passages unblocked," *id.* at 78, *cf.* ELY, *supra* note 2 (discussed in Section III-b of this Article), Choper does not offer a view with respect to what substantive values should be regarded as constitutionally significant, how far the Court should go in protecting such values, or how the Court should go about resolving these issues. Indeed, Choper intentionally excludes from his concern an attempt to resolve the issue addressed by most contemporary theorists: the "development of 'a principled approach to judicial enforcement of the Constitution's open-ended provisions' securing individual rights." CHOPER, *supra* note 1, at 79, *citing* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 448 (1977). Moreover, only nine of the book's 415 pages are devoted to discussion of the substantive content and nature of individual rights. CHOPER, *supra* note 1, at 70-79.

60. Although the concern of this article is with the costs to the federal Constitution that have been associated with the search for legitimacy in constitutional theory, it is important to note that this search has had a dramatic effect, albeit indirect, on the function of state constitutions. Despite the fact that the role of state constitutions in structuring fundamental principles of fairness and justice has often been overshadowed by preoccupation with federal constitutional law, the importance of that role is well-established. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Falk, *Foreword: The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Indeed, the creation of the federal Constitution was, to a large extent, informed by the conception of state constitutions as statements of "ideology and aspirations as much as [lists] of precise rights legally enforceable." Kenyon, *Constitutionalism in Revolutionary America*, in CONSTITUTIONALISM: NOMOS XX 84, 96 (J. Pennock & J. Chapman eds. 1979). And despite persistent assertions that federal courts are the preferred forum for litigating claims of individual rights, *see, e.g.*, Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977), both historical considerations regarding the role of state courts and state substantive rights, *see, e.g.*, Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), and recent trends toward the contraction of federal jurisdiction across a number of substantive areas, *see generally* *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1274-82 (1977), suggest a continuing and vital role for state courts in the resolution of claims of individual rights. To be sure, state courts remain free to interpret and develop their own constitutional protections of individual rights beyond the scope of their federal counterparts. Moreover, they may do so independently of the United States Supreme Court—in terms of both substantive outcomes and processes of decisionmaking. That some state supreme courts have taken this independence seriously is perhaps best illustrated by the experience in California. *See, e.g.*, *People v. Ramirez*, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979); Note, *Rediscovering the California Declaration of Rights*, 26 HAST. L.J. 481 (1974). *See generally* Note, *Of Laboratories and Liberties: State Court Protection of Political and Civil Rights*, 10 GA. L. REV. 533 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973). But especially in those areas that implicate state constitutional provisions with identical or similar federal analogues, state courts have commonly refused to exercise independence. *See* Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620 (1951). Instead, they have generally adopted the Supreme Court's analysis as either influential or determinative of their own. *See, e.g.*, Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970). In light of this phenomenon, the restraining and sterilizing influence of contemporary federal constitutional theory has acted to inhibit the development of state constitutional doctrine. To the extent that state courts adopt the Supreme Court's methodologies in interpreting state constitutional provisions, such as those pertaining to due process or equal protection, the independent vitality and adaptability of state substantive law has suffered. This situation is anomalous, at least to the extent that the theoretical assumptions giving rise to the search for legitimacy in the federal domain are either mitigated or inapposite vis-à-vis the states. (In this regard, one's views might well be influenced by whether state judges are elected or appointed, the ease with which state constitutions can be amended, etc. *See* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 934-44 (1976); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 293-96 (1973).)

For an example of this point, the Ohio Supreme Court in *Cincinnati Bd. of Educ. v. Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979), *cert. denied* 444 U.S. 1015 (1980), substantially relying on the United States Supreme Court's equal protection analysis outlined in *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973), rejected a challenge to Ohio's scheme for funding public education, despite the fact that the Ohio Constitution clearly

concern for the judicial role. I will then evaluate the theory recently propounded by Professor Ely in terms of these costs. Finally, I will suggest a further cost with importance not only for the development of constitutional law, but for the way legal scholars and students view law as a whole.

A. *The Effect of Constitutional Theory on the Constitution's Central Function*

As previously noted, constitutional theory has increasingly come to assume a life of its own. The search for new and better processes of constitutional decisionmaking has become the most important goal of constitutional scholarship.⁶¹ Typically, theorists define their goals in terms of seeking a more satisfying accommodation of the tensions created in harnessing the Constitution and the Court in the pursuit of greater social justice. Often, however, the concern for just decisions is subordinated to the concern for the legitimacy of the decisionmaking process; that is, the justness of a decision is de-emphasized, as if there was a need to feel embarrassed that the Constitution and justice might occasionally intersect.⁶² Occasionally, the methodologies proposed by theorists are invoked in a mechanical and formal manner: the deci-

designates education to be a fundamental right. The court's refusal to reach the result which a close application of *Rodriguez's* analysis seemed to have required was influenced importantly by its concern for legitimacy—a concern which was based on assumptions borrowed from United States Supreme Court tradition. In effect, those concerns may have acted to blind the court to the significance of a substantive value that the state constitution marked as special.

The important point here is not that all state courts should be more active in the development and elaboration of state constitutional norms, or that state judges ought not to have a conception of the distinctions between the legislative and judicial functions. Nor could it be contended seriously that state courts should act arbitrarily or randomly in substituting their personal value judgments for those of the legislature. Rather, the way the state courts define their role and the extent to which they view their constitutions as implicating evolving ethical or moral principles subject to judicial elaboration ought to depend upon factors that have particular relevance for that state, *e.g.*, constitutional language and history, political and cultural traditions, judicial accountability to the electorate, and the relative ease with which strongly opposed judicial interpretations can be affected through the process of constitutional amendment. In short, although state constitutional interpretation should be deliberative and rational, its dynamics should not be governed through a mechanical importation of the prudential and theoretical factors that permeate United States Supreme Court opinions. Instead, those dynamics should be determined by a careful assessment of the judicial role which best comports with the unique character of the state's own political institutions and traditions.

Although state courts retain the option of adopting their own conceptions of legitimacy, their failure to do so may be better understood in terms of inertia and habit than in terms of conscious choice. And as long as they continue to adopt the methodologies spawned by federal constitutional decisions (and, by definition, the associated theoretical assumptions), the deficiencies of federal constitutional theory will be imposed on state constitutions. This situation may present serious costs for the vitality of federalism, which contemplates state independence and creativity in the development of state constitutional norms. *See e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814, 2842 (1980) (Rehnquist, J., dissenting) (arguing that the "healthy pluralism" of federalism militates against an interpretation of the first amendment that precludes state court judges from denying public and press access to criminal trials); *see also id.* at 2835 n.15 (Brennan, J., concurring). These federalism-related costs should enhance our sensitivity to the broader implications of the search for legitimacy to which this Article is addressed.

61. *Cf.* Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1309 (1979) ("American constitutional law scholarship can be viewed as a continuing dialogue between natural law and institutional perspectives. Both assume that the constitutional design should guarantee the conditions of a just society, but differ in the assignment of the courts' role in that order.").

62. In this regard, I have felt more than a twinge of embarrassment myself. *See* note 48 *supra*.

sion generated by the process is evaluated in terms of how "correctly" the process was applied. Debate over outcomes then collapses into a debate over the methodology itself. Was the methodology used correctly? Is it internally consistent? Is the methodology flawed? Can it be repaired with some minor tinkering, or must it be radically transformed?⁶³ During the course of this debate, the Constitution itself—as a standard or guide for the evaluation of political judgment—is substantially ignored.

Although citations to scholarly discussions and judicial opinions to support this observation are available, perhaps reference to a description of the "questions presented" in *J.B.K., Inc. v. Caron*,⁶⁴ a case in which Supreme Court review was recently sought, will suffice. The account in *United States Law Week* was as follows:

Questions presented: (1) Was appellate and trial courts' decision to deny preliminary relief in this case bottomed upon proper test to be employed when facts present issue under Equal Protection Clause of Fourteenth Amendment? (2) Has court of appeals decided important question of federal law that has not been, but should be, finally settled by this Court, to wit: should traditional "two-tier" analytical framework for reviewing legislative classifications under Equal Protection Clause be used or should Justice Marshall's test (as expressed in, e.g., *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)) be used, i.e., whether there is appropriate governmental interest suitably furthered by differential treatment?⁶⁵

Clearly, one who had not read the lower court decisions would have no idea what this case was about. What was the government action that was under challenge? Why was it alleged to be unconstitutional? Given the reliance upon the equal protection clause, what were the competing conceptions of equality or fairness asserted by the parties? The appellant was apparently either unconcerned with any of these questions, or at least convinced that they wouldn't matter to the Court. Instead, the dispute was couched in purely formal and theoretical terms. The "question of federal law" that the appellant regarded as at stake was which "analytical framework" was appropriate. At least for the appellant's counsel, the transformation of substance into theory was complete.

Of course, the perception of one lawyer may not be conclusive evidence of a trend. But the appellant's counsel in *Caron* had considerable reason to believe that the important—indeed the determinative—issue in his case was the one he presented. In fact, the development of equal protection doctrine in recent years is a particularly relevant illustration of the ascendancy of theory

63. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 43 (1962) ("Thayer's rule of the clear mistake should, therefore, be expanded to read as follows: What is rational, and rests on an unquestioned, shared choice of values, is constitutional."); ELY, *supra* note 2, at 105-16 (arguing that neither the "specific threat" nor the "unprotected message" approaches to the first amendment are sufficient in themselves, and arguing for a better theory that would consist of a combination of the two).

64. *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980).

65. 48 U.S.L.W. 3379 (December 4, 1979).

over substance. The Supreme Court's approach to equal protection analysis has developed in three separate strands.⁶⁶ The most prominent strands have been the so-called top and bottom tiers of analysis. Using the top tier, the Court analyzes legislative classifications to determine whether they impact upon "discrete and insular minorities,"⁶⁷ in which case the legislation is deemed "suspect."⁶⁸ Alternatively, the Court determines whether the legislation affects some "fundamental interest."⁶⁹ In either situation, the legislation is subjected to "strict judicial scrutiny," a test that has proved "'strict' in theory, but fatal in fact."⁷⁰ Using the analysis' bottom tier, the legislation must "bear a rational relationship to a legitimate state interest," a test that it will almost always pass.⁷¹

As a form of constitutional theory, this approach to equal protection was apparently designed to address the problem of the judicial role by carving out areas in which the Court would generally defer to legislative judgments, and to that extent mitigate claims of judicial usurpation of legislative prerogative. Simultaneously, this approach permitted the Court to retain the power to intervene in what was thought to be its special domain—the protection of individual and minority rights.⁷²

In recent years, this method of analysis has come under increasing criticism, both among the commentators⁷³ and the Justices themselves.⁷⁴ The leading critic has been Justice Marshall, who, in a series of dissenting opinions, has repeatedly called for its abandonment in favor of a less formalistic, "sliding-scale" approach.⁷⁵ Moreover, as previously noted, Professor

66. See generally Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979).

67. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

68. See, e.g., *City of Mobile v. Bolden*, 100 S. Ct. 1490, 1505 n.23 (1980) (Plurality opinion).

69. See, e.g., *id.* at 1504; *id.* at 1526 (Marshall, J., dissenting).

70. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (opinion of Brennan, J.). That strict scrutiny need not always prove fatal is suggested by a comparison of Justice Powell's opinions in *Bakke*, *id.* at 269 and *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2783 (1980) (concurring opinion). Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

71. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970).

72. See generally Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942); Wechsler, *Stone and the Constitution*, 46 COLUM. L. REV. 764 (1946). For arguments that this two-tiered approach is inherently incapable of resolving the theoretical problems to which it is addressed, see Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); Braden, *The Search for Objectivity in Constitutional Law*, 57 YALE L.J. 571, 579–82 (1948).

73. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

74. See, e.g., *Craig v. Boren*, 429 U.S. 190, 210–11 and n.* (1976) (Stevens, J., concurring); *id.* at 211–12 (Powell, J., concurring); *Harris v. McCrae*, 100 S. Ct. 2701, 2708 (1980) (Marshall, J., dissenting).

75. See *Harris v. McCrae*, 100 S. Ct. 2701, 2708 (Marshall, J., dissenting) ("The Court resolves the equal protection issue in this case through a relentlessly formalistic catechism"). See also *Vance v. Bradley*, 440 U.S. 93, 112 (1978) (dissenting opinion); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 318–21 (1976) (dissenting opinion); *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1, 98–110 (1973) (dissenting opinion).

Despite Justice Marshall's protestations, and notwithstanding his view that the two-tiered analysis "hold on the law may be waning," *Harris v. McCrae*, 100 S. Ct. 2701, 2708 n.3 (1980), a majority of the Court continues to employ it, as *Harris* itself made clear. Moreover, in what seems to have been an effort to inject some flexibility in the traditional two-tiered approach, the Court has added a new level of analysis—often

Karst has argued that the preoccupation with methodology, manifested by the development of equal protection doctrine (as well as elsewhere)⁷⁶ has created a "substantive void" in constitutional law.⁷⁷ I would like to explore this criticism a bit further, and suggest why this phenomenon may impose serious costs on the value of the Constitution itself and the role it should play in our society.

Initially, it is important to articulate the conception of the Constitution upon which I rely—a conception that takes the Constitution to be our society's ultimate moral legitimating force.⁷⁸ Alexander Bickel, commenting approvingly on Edmund Burke's conservatism, once wrote:

In order to survive, be coherent and stable, and answer to men's wants, a civil society had to rest on a foundation of moral values. Else it degenerated—if an oligarchy, into interest government, a government of jobbers enriching themselves and their friends, and ended in revolution; or if a full democracy, into a mindless, shameless thing, freely oppressing various minorities and ruining itself.⁷⁹

Bickel observed that "valueless politics and valueless institutions are shameful and shameless," but wrote of the dangers in seeking moral values in "doctrinaire theories of the rights of man" or from the "dictates of abstract theory."⁸⁰ Instead, we must seek to live and govern according to principles, which we must derive from "the experience of the past, in our tradition, in the secular religion of the American republic."⁸¹ He saw the Constitution as a

referred to as the "middle tier"—that it has invoked primarily in the context of gender-based discrimination, *see, e.g.,* *Wengler v. Druggist Mut. Ins. Co.*, 100 S. Ct. 1540 (1980), and which has been utilized in analyzing the constitutionality of benign racial classifications. *See, e.g.,* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, J.). For a new and curious signal that, at least in some contexts, the search for alternative modes of analysis continues, *see* *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2784-85 (1980) (plurality opinion).

In view of these developments, the way in which appellant's counsel framed the constitutional issues in *J.B.K., Inc. v. Caron*, 600 F.2d 710 (8th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980), *see* notes 64-65 and accompanying text, is quite understandable.

76. Professor Ely's book, *ELY*, *supra* note 2, attempts to structure a comprehensive constitutional theory or methodology that would apply to, but also transcend, the area of equal protection. I will turn to his particular methodology a bit later. *See* Section III-b *infra*.

77. *See* notes 44-60 and accompanying text *supra*.

78. By viewing the Constitution as our society's ultimate moral legitimating force, I do not mean to suggest that it is impossible to evaluate the morality of public policy in non-constitutional terms. Instead, I believe that, at least in terms of general popular perceptions, we have come to equate legitimacy with constitutionality. As Richard Parker has noted:

Constitutional argument is *about* the legitimacy of power. Any "constitutional issue" involves a problem of the "constitutionality" of certain uses of power. Constitutionality, of course, is not all there is to legitimacy. Constitutional issues and argument may not capture all possible aspects of issues and arguments concerning the legitimacy of power in general. Other ways of framing issues of legitimacy and arguing about them—ways that, at least on their face, do not partake of constitutional law—are available to us. Still, the fact remains that, in our political culture, argument about constitutionality is one very important way of addressing problems of political legitimacy.

Parker, *Political Vision in Constitutional Argument—Part One: A Call for a New "Jurisprudence" of Constitutional Law*, (February, 1979 draft) (forthcoming in HARV. L. REV.).

The possibility that judicial review may itself act as a legitimating force in our society has been suggested by some scholars. *See, e.g.,* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 29-31 (1962); C. BLACK, *THE PEOPLE AND THE COURT* (1960). Although I find this view to be generally persuasive, it is not central to my argument, except to the extent that scholarly preoccupation with limiting the scope of judicial review has acted to drain the Constitution of its moral force.

79. A. BICKEL, *THE MORALITY OF CONSENT* 23 (1975).

80. *Id.* at 24-25.

81. *Id.* at 24.

fundamental but limited source for such values, limited because it contained few principles that are "sharply inscribed."⁸² Consequently, in our search for governing principles we properly look to the Supreme Court, which "may not itself generate values, out of the stomach, but must seek to relate them—at least analogically—to judgments of history and moral philosophy."⁸³

Despite Bickel's strong belief in the need to have a society grounded in moral values, and his recognition of the essential function the Constitution played in the generation and development of such values, his apparent resignation to what he saw as the inevitable distortion or abuse of the Constitution, as revealed in his rejection of *Roe v. Wade*,⁸⁴ caused him to doubt the faith we could place in either the Constitution or the Court as the source of such values. Instead, Bickel emphasized the overriding importance of another conception of a constitution:

There is another constitution as well; I will call it the manifest constitution; it is the constitution of structure and process, not of due process or equal protection, and certainly not of metaphysical privileges and immunities. More theory has to be poured into it than can be extracted; it is the constitution of the mechanics of institutional arrangements and of the political process, of power allocation and the division of powers, and the historically defined hard core of procedural provisions, found chiefly in the Bill of Rights.⁸⁵

This "manifest constitution" is one that contains little in the way of substantive moral values. It is a constitution that depends intimately upon what Bickel called the "computing principle" of political reason.⁸⁶ It is a constitution that he admitted would present problems for the moralist, who "will find it difficult to sacrifice his aims in favor of structure and process, to sacrifice substance for form."⁸⁷ Ultimately, Bickel concluded that "process and form, which is the embodiment of process, are the essence of the theory and practice of constitutionalism."⁸⁸

Bickel's conception of the Constitution has had an important influence on the development of contemporary constitutional theory. Most theorists concede the moral nature of the Constitution, whether they conceive of law and morality as necessarily related or not.⁸⁹ And, although the Constitution

82. *Id.* at 25.

83. *Id.* at 26. Bickel observed that, in performing this function, the Court proceeds "cautiously and with some skepticism. It recognizes that principles are necessary, have evolved, and should continue to evolve in the light of history and changing circumstances." *Id.* at 25.

84. 410 U.S. 113 (1973), discussed in A. BICKEL, *THE MORALITY OF CONSENT* 27-29 (1975).

85. A. BICKEL, *THE MORALITY OF CONSENT* 29 (1975).

86. "Political reason is a computing principle: adding, subtracting, multiplying, and dividing, morally and not metaphysically, or mathematically, true moral denominations." *Id.* at 23-24.

87. *Id.* at 30.

88. *Id.*

89. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); Grey, *Constitutionalism: An Analytic Framework*, in *CONSTITUTIONALISM: NOMOS XX* 189 (J. Pennock & J. Chapman eds. 1979); Bayles, *Morality and the Constitution*, 1978 ARIZ. ST. L.J. 564; Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979); Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HAST. CONST. L.Q. 487 (1979); Perry, *Abortion, the Public Morals, and the*

cannot be the exclusive source for morality,⁹⁰ it is generally agreed that it does either contain or point to norms of justice and fairness that should be taken as particularly important in our social order. Like Bickel, however, many theorists believe that the moral principles of the Constitution are, in the main, nonspecific or obscure. Because of the potential for injustice inherent in imposing moral values with an uncertain constitutional pedigree against the conventional morality presumptively reflected in legislative acts, these theorists demand a degree of certainty in interpretation that is not easily met.⁹¹ As a result, the possibility and range of acceptable, judicially construed constitutional moral rights is substantially contracted. With its ability to generate acceptable moral values of a specific sort thus restricted, the only acceptable middle ground that allows for the continued meaningfulness of the Constitution is reliance upon its formal and structural characteristics: its concern for the processes through which society's values should be determined becomes the key.⁹²

Thus, the role of the Constitution as a font of substantive moral values has, for many theorists, largely given way to the view that the ultimate morality is in the processes that it prescribes. In this sense, the substance of constitutional law and the methods for its judicial elaboration become fused; as in the area of equal protection, the processes judges use to reach their decisions sacrifice substance to form. But this notion of the Constitution, in my judgment, is incomplete. The Constitution's concern for morality is broader than this view admits. Aside from its role as a direct source of moral value, the Constitution must also be understood as establishing a framework against which fundamental notions of morality evolve. It provides a source of moral legitimation upon which the validity of political decisions ultimately depends.⁹³ It provides a context against which moral debate and argument

Police Power: The Ethical Function of Substantive Due Process, 23 U.C.L.A. L. REV. 689 (1976); Tribe *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

90. See, e.g., Bennett, *A Comment on Cecelia Kenyon's "Constitutionalism in Revolutionary America,"* in CONSTITUTIONALISM: NOMOS XX 210 (J. Pennock & J. Chapman eds. 1979); Bennett, *The Constitution and the Moral Order*, 3 HAST. CONST. L.Q. 899 (1976).

91. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 138 (1977) ("The policy of judicial activism presupposes a certain objectivity of moral principle; in particular, it presupposes that citizens do have certain moral rights against the state. . . . Only if such moral rights can exist in some sense can activism be justified as a program based on something beyond the judge's personal preferences.").

92. If constitutional law is to be understood as expressing contemporary societal norms, it is hard to see how courts can, in the end, set their judgment concerning the content of those norms against a deliberate and broadly based political decision, say, one made by Congress after full debate or embodied in legislation recently enacted by most states. Political decisions such as these ought to be considered controlling not because they evidence societal norms. . . . but because the process that has led to them is the ultimate source of law's legitimacy in a democratic society.

Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1186-87 (1977). See also ELY, *supra* note 2 at 73-77.

93. Cf. Parker, *Political Vision in Constitutional Argument—Part One: A Call for a New "Jurisprudence" of Constitutional Law* (February, 1979 draft) (forthcoming in HARV. L. REV.). ("We should learn to see the practice of constitutional argument as a cultural artifact, a figurative mode of political legitimation, shaped by our vision of the present reality and possible perfection of our political life. For it springs from our imagination, and it speaks to our imagination, our deepest prism of thought and emotion. It constructs, and it communicates, an ideology of political order.")

must take place. And that context cannot consist solely of the processes through which governmental decisions are reached; it must be deeper and richer. For the processes the Constitution establishes cannot be valued only in intrinsic terms. They are valued because of their capacity to produce decisions that are morally sound.

This view of the Constitution does not presuppose a wholly objective notion of morality. Although it may well recognize broad concepts of morality upon which a general consensus may in fact, or is likely to, exist, it provides the vehicle through which new conceptions can emerge.⁹⁴ Moreover, even conceding the controversiality of specific conceptions of morality that may be viewed as predominant at any point in time, and the legitimacy of a concern for the Court's imposing them upon legislative judgments, this view contemplates an ongoing role for the Constitution in moral debate. The morality of political judgments cannot be fully understood or accepted unless perceived in constitutional terms. In this sense, constitutionality and morality become inexorably linked. To say that legislative judgments are constitutional is to confirm their morality.

As thus conceived, the Constitution serves as an essential component of the "moral background" from which the law emerges and to which it must be responsive.⁹⁵ This does not mean that the Constitution will always provide answers that are concrete, specific, or even "morally correct." To the contrary, judgments may often represent no more than a choice between alterna-

94. Although Professor Dworkin's distinction between "concepts" and "conceptions" is helpful for purposes of this analysis, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 132-37 (1977), see also O'Fallon, *Adjudication and Contested Concepts: The Case of Equal Protection*, 54 N.Y.U. L. REV. 19 (1979), it is not sufficient. As I have suggested elsewhere, Saphire, *Professor Richards' Unwritten Constitution of Human Rights: Some Preliminary Observations*, 4 U. DAY. L. REV. 305 (1979), I believe this analysis regards the moral judgments of the framers as dispositive, albeit in a very general and suggestive way. The view of the Constitution that I develop here is broader than I believe Dworkin's approach might allow. In arguing that the Constitution provides a "moral framework" against which the debate over values should take place, I contemplate the possibility that values emerging from that debate may, albeit tentatively held, achieve the status of "constitutional," though we could not argue that the framers would have endorsed them even in their most generalized form.

95. This conception of the Constitution as a "moral background" for the formulation and evaluation of legislative decisions is best understood as invoking a "constructive" variant of the "coherence" theory of morality as developed by Professor Dworkin. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 159-68 (1977). Unlike a "natural" model, which presupposes the objective existence of abstract and fundamental moral principles according to which political judgments must be assessed, *id.* at 160, the constructive model "does not assume . . . that principles of justice have some fixed, objective existence, so that descriptions of these principles must be true or false in some standard way." *Id.* Instead, it depends upon the idea that the structuring of fundamental moral values can be aided by, but will not be wholly dependent upon, intuition. While such values can be said with conviction to exist, they do so in a contingent sense, and they may "change as the general condition and education of people change." *Id.* at 166.

In this respect, the constitutional text, in terms of specific provisions and the "structure and relationships" that it evokes, see C. BLACK, *STRUCTURES AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969), as well as the historical setting from which the document emerged, see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980), provides the foundation from which public morality springs. Just as these sources of constitutional decisionmaking have proven more notable for their suggestive rather than dispositive effect on the development of doctrine, so have the moral values, which have been thought to underly and order them, been regarded in provisional terms. *Id.* at 229 n.96, 229-38.

tive methods of accommodating conventional morality to an ideal.⁹⁶ Nor does this view, in itself, respond to the complex problems of institutional roles. It does not answer the many questions pertaining to the legitimacy of judicial review that constitutional theorists often raise, and to which their theories purport to respond. What it does do, however, is provide a standard against which constitutional theories should be evaluated. Theory must account for the moral role that the Constitution must serve. In the next part of this Article, I will argue that John Ely's recent attempt to construct a theory of judicial review—perhaps the most sophisticated and comprehensive effort since Alexander Bickel's *Least Dangerous Branch*, published in 1962—fails to meet this standard.

B. John Hart Ely's "Democracy and Distrust"⁹⁷

*Law is the outcome of a bargaining process . . . but it is altogether possible that such outcomes will include "repressive, envenoming," "unwise and even dangerous" laws. The substantive content that underlay Bracton's and Adams' concept of law has vanished, and the notion of law has decayed into pure proceduralism—the recognition of public will as mediated by the institutions authorized by the Constitution to pass laws. Without seeking to denigrate the importance of procedures which we might well cherish and defend as necessary to any proper notion of a decent political order, one can nonetheless point to dangers in viewing them as sufficient to evoke the reverence claimed for them.*⁹⁸

The previous discussion has emphasized that while the Constitution plays an important role in identifying fundamental moral values and pointing to others,⁹⁹ it serves the even broader, and perhaps more significant, function

96. The prospect that choice may be inevitable in resolving apparent conflicts between the morality of particular legislative judgments and our society's continuing belief in ideal moral goals has often constituted the major argument against an active judicial role. See, e.g., Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1168–72 (1977). But the commitment (resignation?) to moral relativity that characterizes so much contemporary jurisprudential and philosophical thought, see, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6, 10 (1971), makes the exercise of choice inevitable. In my view, our deeply ingrained view of the Constitution as a manifestation of our "civil religion," see Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123; M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (draft 1980) at Ch. 4, reflects our commitment to the notion that moral ideals are never completely realized and that they are, perhaps, unrealizable. In this sense, morality is always in a state of evolution. As conventional morality comes to approximate deeply held conceptions of our moral ideals, the pressure to reevaluate those ideals increases. In this context, the Constitution serves not only to help us identify our ideals as they have been formulated historically, but also serves as a symbol of the perfection we seek. Cf. Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937) (arguing that the power, authority and prestige of the Court and the Constitution are best understood in terms of the symbolic role they play in our society).

97. ELY, *supra* note 2.

98. Levinson, *The Specious Morality of the Law*, HARPER'S, May 1977, at 35, 38 (footnote omitted).

99. By saying that the Constitution "points" to values that are not explicitly enunciated, I refer to the general agreement that the Constitution creates more rights than can be gleaned from a literal reading of the text. The contemporary debate is not whether such rights exist, but on the modes of analysis appropriate for their identification. Compare *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973) (a right must be either "explicitly or implicitly guaranteed by the Constitution") with, *id.* at 102–03 (Marshall, J., dissenting) (non-explicit fundamental interests must be "firmly rooted in the text of the Constitution" and must be "inter-related with constitutional guarantees"). See also *Richmond Newspapers, Inc. v. Virginia*, 100 S. Ct. 2814 (1980) (plurality opinion of Burger, C.J.) ("The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular rights.").

as the moral background—the organizing force—against which our moral evolution takes place. Thus while there is room for legitimate debate concerning what our fundamental moral values are or ought to be, and over the role that various institutions should play in their determination, we must take care that the debate itself is sensitive to this broader function. For reasons that I will now suggest, John Ely's "representation-reinforcing" or participation-focused theory of judicial review poses serious obstacles to the Constitution's ability to perform either of its important roles.¹⁰⁰

Professor Ely's theory of judicial review is the culmination of over a decade of his thinking.¹⁰¹ It is premised upon several basic propositions, the most important of which are: (1) that the Constitution contains many important provisions that "cannot intelligibly be given content solely on the basis of their language and surrounding legislative history" and that "seem on their face to call for an injection of content from some source beyond the provision . . .";¹⁰² (2) this content must be supplied according to a theory "derived from the general themes of the entire constitutional document and not from some source entirely beyond its four corners";¹⁰³ (3) while the Constitution contains some provisions that clearly single out substantive values to be specially protected from the political processes,¹⁰⁴ the "overwhelming" con-

100. The analysis which follows is intended to point to deficiencies in Ely's theory on what Professor Tribe might describe as a "metatheoretical" level, see generally Tribe, *Toward a Metatheory of Free Speech*, 10 S.W.U. L. REV. 237, 238 (1978), suggesting features of Ely's work that make his theory unsatisfying in a general sense. I shall be offering a more substantive critique of Ely's approach, as well as that of process theorists in general, in an article now in progress, tentatively entitled *The Worst Case Justification for Judicial Review: Some Reflections on the Holocaust*.

101. See, e.g., Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

102. ELY, *supra* note 2, at 12. The provisions that are of most general concern to Ely are the due process, equal protection and privileges and immunities clauses of the fourteenth amendment as well as the ninth amendment. ELY, *supra* note 2, at 14-41.

Ely argues that resort to sources of interpretation lying outside particular provisions is fully consistent with traditional, "interpretivist" canons of construction since the relevant provisions must be read as embodying an "invitation" by the framers to do so. *Id.* at 13. This notion is more fully developed in Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978).

This facet of Ely's theory deserves special note. To the extent that he relies upon the Framers' intent, albeit in a quite generalized sense, his theory falls within the mainstream of traditional constitutional interpretation. To borrow a phrase from Professor Brest, it represents a "moderate" form of "originalism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980). As such, it takes the Framers' intent as dispositive. Thus, the entire structure of his theory depends for its validity upon his version of the original understanding. That such a foundation is somewhat fragile is revealed by the robust and sometimes heated controversy generated by Raoul Berger's book. See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977). For Berger's reaction to Ely's historical conclusions, see Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979).

103. ELY, *supra* note 2, at 14.

104. The most important provisions that Ely concedes (and I use the verb advisedly) point to substantive values are the contracts clause and the thirteenth amendment. Further, he admits that other provisions, such as the establishment and free exercise clauses of the first amendment, as well as the third, fourth, fifth and eighth amendments have value-oriented characteristics, but argues that a desire to protect substantive values cannot completely explain their significance. Instead, he argues that such provisions can be completely understood only in terms of their concern, both separately and viewed together, for structure and process. See generally ELY, *supra* note 2, at 88-101.

cern of both the original Constitution, the Bill of Rights, and post-Civil War Amendments is with "procedural fairness in the resolution of individual disputes (process writ small)" and "with what might capaciously be designated process writ large—with ensuring broad participation in the processes and distributions of government."¹⁰⁵ Thus, the "selection and accommodation of substantive values is left almost entirely to the political process . . .";¹⁰⁶ (4) even if one were to view the Constitution as (more) broadly concerned with moral values, no method has yet been developed, nor is one conceivable, that would direct unelected federal judges to the discovery of those values in a way that could be reconciled with "the basic democratic theory of our government";¹⁰⁷ techniques for determining fundamental values, which focus on the judge's own values, natural law, reason, neutral principles, tradition, consensus and "progress" are hopelessly subjective, idiosyncratic, elitist, and susceptible to manipulation;¹⁰⁸ (5) the Constitution's pervasive concern for governmental structure and process and the lack of suitably objective sources and methods for judicial value determinations, when viewed in light of the unique characteristics and perspectives federal judges possess by virtue of their insulation from the political processes,¹⁰⁹ compel the conclusion that courts should limit themselves to policing the representative processes of government. As thus perceived, the primary task of judicial review is "to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."¹¹⁰

Given these premises, Ely's theory casts the Court as the guardian of the "manifest constitution" that Alexander Bickel had earlier described.¹¹¹ Instead of facilitating the identification, development, or elaboration of society's moral values—thereby actively helping society to work out "the implications of broad, imprecise moral ideals or principles"¹¹²—Ely would limit the Court to the role of "clearing the channels of political change." In this posture, the Court must take the Constitution seriously as a standard for determining the legitimacy of the processes through which law is made. Both the Constitution and Court must be viewed as generally unconcerned with the

105. *Id.* at 87 (footnotes omitted).

106. *Id.*

107. *Id.* at 45.

108. *Id.* at 43-72. For further elaboration of Ely's views of the requirements of democratic theory as they relate to judicial review, see *id.* at 1-7.

109. Ely discusses the special characteristics of the federal judiciary. *Id.* at 75 n.*, 101-04.

110. *Id.* at 76.

111. See notes 85-87 and accompanying text *supra*.

112. Perry, Book Review, 78 COLUM. L. REV. 685, 700 (1978). Professor Perry's conception of the appropriate scope of judicial review represents a stark contrast to Ely's and should be consulted by those interested in understanding the sort of value-oriented theory Ely rejects. Perry's theory has been developed in, e.g., *id.*; Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 GEO. L.J. 1191 (1978). Perry will soon offer a comprehensive elaboration of his views. M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF POLICY-MAKING BY THE JUDICIARY* (draft 1980).

legitimacy of the outcomes those processes produce. Legislative outcomes are to be evaluated only in instrumental terms: they are important indicia of whether the processes are working well.

In Ely's scheme, there are circumstances in which, given the realities of history and human nature, courts should be especially careful in evaluating the perfection of process. Although our representative, participation-oriented political system presumes that, once enfranchised,¹¹³ the success of any individual or group in securing desired benefits from the political processes must depend upon their independent strength and their ability to build coalitions, Ely notes that sometimes this pluralist model doesn't work, "as the single example of how our society has treated its black minority (even after that minority had gained every official attribute of access to the process) is more than sufficient to prove."¹¹⁴ In the case of overt racial classifications, laws almost always should be found unconstitutional, not just (or primarily) because they suggest the deficiency of legislative processes, but because they are wrong—that is, because they violate the Constitution's clear (and atypical) concern for a moral value (e.g. racial equality).¹¹⁵ In the case of alleged

113. The right to vote in federal elections is expressly recognized and qualified by the Constitution itself. U.S. CONST. art. I, § 2, cl. 2, amends. XIV; XV; XVII; XXIV; XXVI. The right to vote in state elections, although referred to in several constitutional provisions, *see, e.g.*, U.S. CONST. amends. XIV, § 2; XV; XXVI, generally has not been regarded as so literally compelled. It has, however, been regarded as a fundamental right because of its close relationship to other express rights. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966). Professor Ely defends the recognition of the underlying right, as well as active judicial review in protecting it, because the right is intimately related to the core of representative government and "denial of the vote seems the quintessential stoppage," ELY, *supra* note 2, at 117 (footnote omitted), of the political processes, the "unblocking" of which "judicial review ought preeminently to be about. . . ." *Id.*

114. *Id.* at 135.

115. Ely also argues that governmental action which selects "people for unusual deprivation on the basis of race, religion, or politics, or even simply because the official doing the choosing doesn't like them." ELY, *supra* note 2, at 137 (footnote omitted), is unconstitutional because it is "inconsistent with constitutional norms" to so act. Thus, he appears to regard such action as unconstitutional not because of value-neutral blockages or defects in the political process, but because it violates a constitutionally premised moral value of equal concern and respect. *Id.* at n.10. As it pertains to religiously motivated discrimination, this conclusion is consistent with his overall approach, since he regards the free exercise clause of the first amendment as at least primarily intended to protect a moral value. *Id.* at 94, *but see id.* at 100. The same may be true with respect to the claim of racial discrimination, given his view that the thirteenth amendment "embodies a substantive judgment that human slavery is simply not morally tolerable." *Id.* at 98. (The preceding observation is made tentatively because Ely does not, at least for me, make very clear his view of the relationship between racial equality and constitutional morality. In the case of racial discrimination not amounting to slavery, Ely's position seems to be that although the prohibition of racial classifications is the equal protection clause's "core purpose," *id.* at 31, that prohibition is not compelled by a constitutionalized moral value. With the exception of the thirteenth amendment, Ely argues that "the Reconstruction Amendments do not designate substantive values for protection from the political process." *Id.* at 98 (footnote omitted)).

Ely's claim that a deprivation on the basis of political affiliation violates a "constitutional norm" is, however, somewhat confusing, for he points to no constitutionally enshrined substantive value which prohibits such discrimination. Although he would probably point to the first amendment's "freedom of association," that "norm" is not textually expressed. *See generally* Raggi, *An Independent Right to Freedom of Association*, 12 HARV. C.R.-C.L. L. REV. 1 (1977). To be sure, he does argue that freedom of political association has "without serious controversy" been held to be "fully protected." ELY, *supra* note 2, at 105. But he takes care to note that this protection is not properly attributable to the fact that the Constitution expresses a normative judgment (i.e., moral value, such as equal concern and respect) to that effect, but to the fact that political association is "critical to the functioning of an open and effective democratic process." *Id.* And although Ely concedes that an individual's interest in participating in the political process is reflective of a constitutional value, *id.* at 75 n.*, it is one that he appears to regard as significantly different in kind (i.e., in its moral nature) than, for instance, a

racial discrimination that is not expressly detectable from the statute's wording, however, the government's underlying motivation is the key: at least in terms of benefits that are "constitutionally gratuitous,"¹¹⁶ unequal distribution is constitutionally inoffensive unless the result of legislative processes that were in fact marked by racial prejudice.¹¹⁷ When such maldistributions adversely effect racial minorities, the Court should accord them special scrutiny. When it concludes that they were attributable to prejudice, the Court should declare them unconstitutional in a provisional sense. The legislature is free to reenact the same legislation once the prejudice has been removed.¹¹⁸ Thus, inequalities in the allocation of constitutionally gratuitous benefits are unconstitutional because of, and to the extent that they reveal, a malfunctioning of the political processes.

Ely then goes on to argue that the same considerations should apply to analyzing the judicial role when government action accords disadvantageous

value of autonomy or respect that others have pointed to as supporting the associational interest. *See, e.g.,* Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980). Of course, Ely could argue that participation is the over-arching moral value expressed by the Constitution—an argument that, in fact, he seems to make, ELY, *supra* note 2, at 75 n.*,—but despite his assertion to the contrary ("Participation itself can obviously be regarded as a value, but that doesn't collapse the two modes of review I am describing into one." *Id.*) this position makes participation, and all the rights and interests necessary for its meaningful exercise, as problematic a candidate for judicial declaration as any of the more substantive values that he rejects as suitable for judicial invocation. (Where does the Constitution expressly single out participation as its special moral value?) Alternatively, Ely could point to the equal protection clause as the "constitutional norm" that precludes political discrimination, but he could not do so without either expanding its significance as a source of substantive values or reconnecting the political discrimination problem to the value-neutral concerns of process. His at least implicit recognition of this dilemma is evidenced by his ultimate return to a process-based justification for invalidating political discrimination: "When such a principle of selection has been employed, the system has malfunctioned. . . ." *Id.* at 137; *see also id.* at 141.

These problems are even more acute in the case of disadvantageous treatment by a government official based solely on the official's dislike of an individual. Although the moral value of equal concern and respect may preclude such treatment, it is hard to see how Ely's theory could locate that norm as either expressed or implicit in the Constitution it contemplates. These examples, as well as others scattered through the book, reflect the prominence of the moral value of equal concern and respect to Ely's overall view of the Constitution. Reference to such a value, which has served as an essential component of Ronald Dworkin's moral philosophy of law, *see* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 177-83 (1977), can be found throughout Ely's book. ELY, *supra* note 2, at 82, 87, 98, 137 n.10, 157. Ely's heroic attempt to camouflage its moral nature, or to change it into some morally-neutral process form, is, in my view, terribly unsuccessful. More importantly, however, it is a paradigm of the sort of constitutional theory whose costs to the Constitution's central function is this Article's major concern.

116. *Id.* at 136. For Ely, constitutionally gratuitous benefits are those "goods, rights, exemptions, or whatever—that are not essential to political participation or explicitly guaranteed by the language of the Constitution. . . ." *Id.*

117. Ely argues that, when used in an undifferentiated way, "prejudice" is a "mushword." *Id.* at 153. Accordingly, he breaks the concept down into two basic categories. "First degree" prejudice is that which is malevolent, sinister and unabashed, reflecting the view that people should be disadvantaged simply *because* they are regarded as less worthy of concern and respect than others. *Cf. Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (Discriminating purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.") (footnote omitted). A second variety of prejudice which triggers constitutional concern arises not because its victims are "disliked," but because their desires and interests are either unknown to the legislature, or because they are likely to be "discounted" or improperly understood. *See generally* ELY, *supra* note 2, at 153-61.

118. ELY, *supra* note 2, at 138-39. Ely argues that while such declarations of unconstitutionality are theoretically provisional, they will often operate to preclude reenactment of the same policy. *Id.* He is clearly prepared to admit, however, that reenactment is possible. This is apparently a price that any viable theory must pay. *Id.* at 139.

treatment to members of groups whose distinctiveness is not measured in terms of race. Thus, legislation that disadvantages aliens,¹¹⁹ homosexuals,¹²⁰ and (occasionally) the poor,¹²¹ should be regarded as suspicious, while laws differentiating on the basis of age,¹²² medical condition (such as high blood-pressure),¹²³ professional status,¹²⁴ and criminal convictions¹²⁵ would not. The problem of sex discrimination is somewhat more "complicated." Gender-based classifications would warrant special judicial intervention when they can be traced demonstrably to the malfunctioning or blockage of the normal political processes. Special problems relating to the growing access and effectiveness of women in the political processes create both historical and geographical problems for his theory, and Ely resolves these problems in an especially pragmatic fashion.¹²⁶

It is important to remember that, except in the case of the few areas in which the Constitution expresses concern for substantive values, the occasions when Ely's theory would warrant heightened judicial activism in the unequal allocation of gratuitous benefits depend upon the malfunctioning of the political process. They do not depend upon the incompatibility of such allocations with substantive moral values that the Constitution marks as special. In his judgment, the Constitution offers no useful guidance in determining whether the Framers' moral concerns extended beyond equality of the races.¹²⁷ Responding to Justice Rehnquist's view that the Court's special concern should be restricted to classifications based on race and national origin,¹²⁸ Ely argues that it would be "untrue to the amendment's spirit to limit its reach to just those classifications the framers talked about."¹²⁹ Thus,

119. *Id.* at 161-62.

120. *Id.* at 162-63.

121. *Id.* at 162. Ely notes that discrimination against the poor fails to fit neatly into his theory, since: failures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms. A theory of suspicious classifications will thus be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with.

Id. (footnote omitted).

Cf. *Washington v. Davis*, 426 U.S. 229, 248 (1976) (arguing that a constitutional principle that would invalidate government action solely because it disproportionately disadvantages blacks or the poor would be "far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, and regulatory, and licensing statutes. . ."). For a contrasting and less tentative view of the Court's role in protecting the poor, see Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

122. ELY, *supra* note 2, at 160.

123. *Id.* at 163.

124. *Id.* at 155.

125. *Id.* at 154.

126. See generally *id.* at 164-70.

127. As previously noted, Ely is not entirely clear as to whether he views racial discrimination as conflicting with a constitutionalized moral value or whether he views it solely in representation-reinforcing terms. See note 15 *supra*.

128. ELY, *supra* note 2, at 148-49, citing *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting).

129. *Id.* at 149.

“‘racelike’ classifications should be regarded as suspect.”¹³⁰ In identifying what “racelike” means, Ely performs a value-neutral elaboration of the deep theory underlying footnote four.¹³¹ Classifications based upon alienage, homosexuality, wealth, and sex are suspect not because they are wrong, but because they are generated by political processes that are not adequately open and responsive to the registration of constituents’ interests.

Does Ely’s analysis depend upon a personal commitment to political or moral skepticism that denies the existence of moral rights not expressed in positive law?¹³² Based upon parts of his book,¹³³ as well as his previous writing,¹³⁴ the answer is clearly that it does not. Instead, the process-orientation focus of his theory, and its underlying value-neutrality, are based in his overriding conception of democratic political theory and his attendant preoccupation with the judicial role. Although personally denying that “process is of ‘higher value’ than substance,”¹³⁵ Ely’s theory seems to entail just such an ordering.

In a broad sense, Ely’s theory does appear to contain certain moral features. The most prominent of these is the notion of participation itself, from which everything else flows and against which a legislature’s substantive policies are measured. At one point, Ely notes that “[p]articipation itself can obviously be regarded as a value.”¹³⁶ Once having made this concession, he distinguishes participation from more particular substantive value choices on the basis of its transcendent nature and his view that “participational values” are the sort for which the Constitution most conspicuously and pervasively demonstrates concern.¹³⁷ Although this is not the place for an extensive critique of Ely’s view of the values of participation, some observations are especially relevant. Ely focuses on participation because it is what he believes the Constitution is minimally, and most importantly, about. Moreover, he believes that the Constitution’s broad theme of participation is so clearly elaborated and objectively identifiable that courts will have little license or opportunity to substitute their own conceptions. That this is so, of course, is not entirely clear. As Professor Tushnet has observed, Ely’s “basic premise, that obstacles to political participation should be removed, is hardly value-free.”¹³⁸ On the one hand, Tushnet notes that “it is far from established that

130. *Id.*

131. *United States v. Carolene Prods.*, 304 U.S. 144, 152–53 n.4 (1938).

132. For a description of such a view of moral skepticism, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 138 (1977).

133. See, e.g., ELY, *supra* note 2, at 52–54, 175–76, 181–83.

134. See, e.g., Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 926–27 (1973).

135. ELY, *supra* note 2, at 181.

136. *Id.* at 75 n.*.

137. *Id.* Ely also argues that “participational values are the sort. . . (2) whose ‘imposition’ is not incompatible with, but on the contrary supports, the American system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to ‘impose.’” *Id.*

138. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1045 (1980).

participation is the preeminent constitutional value."¹³⁹ On the other, he argues that Ely's view that "participation supports 'the American system of representative democracy'" is equally mistaken.¹⁴⁰ Importantly, Ely fails to define adequately how *much* participation democracy requires. If it only demands the opportunity to participate, the participational value may prove no more meaningful or durable than a poor woman's right to an opportunity to choose to have an abortion.¹⁴¹ In this respect, the right to participate can be as malleable and manipulable as the substantive moral values Ely rejects.¹⁴²

Aside from these problems, Ely's reliance on the value of participation raises another, especially significant problem. If we assume that the Constitution does express a clear and special concern for participation, and if we ignore the threshold problems of manipulation, can that "value" adequately serve to explain and fulfill the Constitution's primary functions? For the following reasons, I believe the answer is that it cannot. First, it is important to consider the nature and meaning of participation. As Professor Pennock has shown, political participation can have many meanings.¹⁴³ The meaning we choose will invariably depend upon the goals or values we think participation should promote.¹⁴⁴ Furthermore, the form or content of participation we choose will depend upon the types of democratic theory we adopt.¹⁴⁵ Professor Pennock notes:

139. *Id.* at 1047. Tushnet argues that, with the notable exception of the first amendment, Ely's view of the Bill of Rights as expressing primary concern for participation instead of substantive values does not succeed. *Id.* at 1046-47. See also Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-67 (1980).

140. *Id.* Although Tushnet's observation that "[n]o more do we believe in Democracy than we do in Justice," *id.*, may, at first blush, seem heretical, it cannot be avoided. See generally M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF POLICYMAKING BY THE JUDICIARY* (draft, 1980). This is especially true given the vigorous and ongoing attempts by scholars to define what American democracy really is. See notes 18-21 and accompanying text *supra*.

141. See, e.g., *Maier v. Roe*, 432 U.S. 464 (1977); *Harris v. McCrae*, 100 S. Ct. 2701 (1980).

142. Consider the question whether the constitution guarantees a right to vote for local officials in a single member, as opposed to an at-large multi-member, districting scheme. In *City of Mobile v. Bolden*, 100 S. Ct. 1490 (1980), a majority of the Court concluded that at-large election schemes are permissible under the fourteenth and fifteenth amendments absent a showing that they are created or applied in a way which intentionally discriminates against Negroes. In a dissenting opinion, Justice Marshall concluded that at-large districting schemes are unconstitutional absent proof of intentional discrimination, where a showing of discriminatory impact is made. In reading this conclusion he invoked, in part, a central component of Ely's theory. *Id.* at 4449, 4454 n.21, citing Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1978), in relevant part substantially reprinted in Ely, *supra* note 2, at 145. Although I could guess at how Ely would have employed his theory to decide this case, strong arguments are available to support either position.

Ely's theory may also be subject to manipulation in determining exactly what rights it would regard as "constitutionally gratuitous." See note 116 *supra*. As Professor Michelman has demonstrated, a particularly sensitive judge could apply Ely's theory in a way that would make the gratuitous/nongratuitous distinction almost meaningless. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. Compare Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 with Appleton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U. L.Q. 715.

143. See generally J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 438-69 (1979).

144. Pennock observes that participation may serve a number of different values, including the creation of "more effective checks on the power of sinister interests," *id.* at 441; the enhancement of motivation "to obtain more, better, and more coherent information on public affairs," *id.* at 442; a greater sense of responsibility for one's political actions resulting in the tempering of "self-interested desires . . . by moral concern for the well-being of others" and "heightened awareness of (one's) own true interests," *id.*; the enhancement of governmental legitimacy, *id.*; and the enhancement of the individual's moral and intellectual development, thus "making a contribution that increases his own sense of dignity and moral worth. . . ." *Id.* at 443.

145. Professor Pennock identifies eight prominent conceptions of democracy, divided between the "motivational" and "power" theories. *Id.* at 445-52.

Of course, it is never a question of being for or against participation. Democracy involves popular participation by definition. It is always a question of how much participation and, in particular, whether a great increase is such a desideratum that we should make radical structural changes so as to create greater incentives and opportunities for participation of a much more active, involved kind, and perhaps at the extreme virtually to compel increased participation.¹⁴⁶

As Professor Pennock's analysis suggests, no one could argue sensibly that participation in government, both directly and through representation, is not important to democracy. Thus, it would be absurd to suggest that participation was not something we all—and the Constitution itself—valued. But to suggest that participation is the only, or even the most basic, value is either wrong-headed or fundamentally incomplete. Participation can be valued in its own right; it does have intrinsic value,¹⁴⁷ at least in the sense that decisions made through processes that are open and in which affected persons' interests can be communicated and respected will be perceived as fairer and more legitimate than would the same decisions reached through processes that are "blocked."¹⁴⁸ But participation must also be understood in instrumental terms.¹⁴⁹ It is valued because it is perceived as generating outcomes that are, in their own right, viewed as morally justified or compelled.¹⁵⁰

Thus, Ely's focus on participation proves inadequate as a foundation upon which to rely in building a viable constitution theory. Processess and structure are important, but their importance depends profoundly on their ability to generate outcomes that are morally defensible. And this is true

146. *Id.* at 445.

147. For a discussion of the extent to which participation in government was intrinsically valued at the time of the American Revolution, see H. ARENDT, *ON REVOLUTION* 115-29 (1963).

148. See generally Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978). Cf. Saphire, Book Review, 58 TEX. L. REV. R. _____ (1980). (forthcoming) (arguing that greater public understanding of and participation in the judicial process will enhance perceptions of fairness and legitimacy).

149. See Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 124 n.56 (1978) ("Just as substantive values are necessary but insufficient to account for justice or fairness, procedurally-based, inherent values cannot, by themselves, be enough."). See also Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) ("Politics must also be a joint and mutual search for good or right answers to the question of directions for our evolving selves."); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1069 (1980). See generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 501-06 (1978).

150. That the *subject* in all these cases is procedure, however, is not to say that the *meaning* and *purpose* of the Constitution's prescriptions on each such subject are themselves merely procedural. There is no reason to suppose that "constitutive" rules—rules defining the basic structure of political and legal relations—can or should be essentially neutral on matters of substantive value.

Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1068 (1980).

In Professor Pennock's analysis, different conceptions of democratic theory put varying degrees of weight on the instrumental and intrinsic values of participation. J. PENNOCK, *DEMOCRATIC POLITICAL THEORY* 445-53 (1979). It is apparent that the Constitution, either in terms of specific provisions or taken as a whole does not incorporate only one conception to the exclusion of all others. Instead, I would argue that the American model of democracy, as historically understood and as practiced, represents a blending of values. It was "chosen" as a form of government because of its capacity to serve both procedural and substantive values. To focus on our governmental structures without retaining sensitivity to substantive values would defeat the purposes of democracy every bit as much as would a failure to attend to structures to the complete exclusion of substantive values.

whether the processes in question are those that the legislatures invoke in formulating and effecting public policy or the processes of decisionmaking that courts invoke in the resolution of constitutional cases.

These problems suggest an even deeper concern with Ely's focus on participation as the primary constitutional value—a concern that generally attaches to the direction of much contemporary constitutional theory. First, because of its preoccupation with the judicial role and its assumptions concerning the subjectivity of moral reasoning, Ely's theory intentionally minimizes the Constitution's ability to serve as a source of particular moral values for our society. Its substantive moral content as well as its capacity to provide an anchor for the elaboration of fresh moral conceptions is radically diminished.¹⁵¹ Even more fundamentally, however, Ely's theory acts to prevent or substantially inhibit the Constitution from playing its broader role of providing a context and background against which moral argument and debate, and ultimately the evolution of moral ideals, can take place. This conclusion is compelled by a proper understanding of the relationship that he sees between the Constitution, participation, and the development of morality.

It must first be recognized that Ely's theory is not, in itself, an amoral one. It does not incorporate the notion that the Constitution is irrelevant to the moral evaluation of public policy. As previously noted, it recognizes some important (albeit exceptional) areas in which substantive moral values are textually embraced.¹⁵² Moreover, his theory has the potential for facilitating fairer results in the ultimate distribution of some goods, rights, and the like to the extent that it ensures that the claims and interests of all individuals and groups are registered in the political process—even if they are not given equal weight.¹⁵³ Thus, "representative-reinforced" legislative outcomes are more

151. To some extent, Ely's representation-reinforcing analysis may undercut the Constitution's capacity to point to values that even he might concede to be constitutionally compelled. He has previously argued that constitutional values cannot be restricted to those explicitly noted in the text, but properly include those "inferable from the language of the Constitution" and "any general value derivable from the provisions (the Framers) included." Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 935-36 (1973). In a footnote following this statement, he observed: "Necessarily, a claim of this sort can never be established beyond doubt; one can only proceed by examining the claims of those values he thinks, or others have suggested, are traceable to the Constitution." *Id.* at 936 n.93. Although his views may have changed somewhat over the years, this continuing belief in the legitimacy of judicial elaboration of some textually non-specific values is apparent. See ELY, *supra* note 2, at 1 ("More often the Constitution proceeds by briefly indicating certain fundamental principles [values?] whose specific implications for each age must be determined in contemporary context"). Although he does not offer a complete list of rights he believes are explicitly guaranteed by the Constitution, he does include as constitutional (and therefore non-gratuitous) those rights that are "essential to political participation." *Id.* at 136. See also *id.* at 145. Now it seems clear that Ely would balk at the number of "fundamental" rights Professor Michelman would include in such a list. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659. But given the apparent lack of any "principled" way to distinguish, say, interstate travel from education—at least in terms of their importance to any conceivably meaningful notion of political participation—and given Ely's pervasive skepticism concerning a judge's capacity to make such distinctions in a non-elitist way, ELY, *supra* note 2, at 59, a judge who accepted Ely's theory might well refuse (not just move cautiously) to recognize any constitutional rights not explicitly noted in the text. Thus, the spirit of restraint may come to assume too much life of its own.

152. See note 104 and accompanying text *supra*.

153. Most process theorists assume that a political process which is compelled to recognize at least the existence, claims and interests of all constituent individuals and groups will effect a "fair" allocation of benefits over a period of time—especially with respect to those whose interests have been traditionally ignored, over-

likely to be "more equal"¹⁵⁴ and *perceived* as more equal (and, for those to whom it makes a difference, more rational¹⁵⁵) than those that are not. To that extent, their moral justification will be enhanced.

Assuming, however, that representation-reinforced policies may be substantively fairer than those that are the products of imperfect processes, a problem remains. By rejecting the view that the Constitution serves as a source for the substantive evaluation of public policy, Ely's theory directs substantive critique to the political arena. Once the policymaking processes are operating in reasonable harmony with the participational value, the outcomes of those processes are presumptively—and, given the standard Ely would apply when reasons for "suspicion" are absent, conclusively—valid: by fusing politics and principle, the Constitution is rendered obsolete.¹⁵⁶ Being unable to provide a source for evaluating the morality of the particular substantive outcomes of the political processes, the Constitution has thus exhausted its function.¹⁵⁷ It is no longer relevant to moral debate. It need

looked or disregarded. *But cf.* R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 274-78 (1977) (arguing that traditional notions of democracy often ignore the distinction between "personal" and "external" preferences.). Such theorists, including Ely and Hans Linde, *see* Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976), would measure the fairness of distributions, not in terms of some abstract moral notion of justice or the constituents' ability to win any particular political battle for particular benefits, but in terms of their ability to achieve their interests in some reasonable proportion to their numbers, political strength, the nature of their claims, and the frequency with which they are asserted. I believe that this assumption is, in important respects, conceptually flawed and that it should not serve as a foundation for structuring a theory of judicial review. I will be developing this argument in a forthcoming article. *See* note 100 *supra*.

154. The likelihood that greater substantive equality—or less disparity—in treatment would result from a legislative process that is open and attentive to the interests of all has apparently animated Justice Stevens' creative equal protection analysis as developed in some recent cases. For example, in his concurring opinion in *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977), he wrote:

I am therefore persuaded that this discrimination against a group of males is merely the accidental byproduct of a traditional way of thinking about females. I am also persuaded that a rule which effects an unequal distribution of economic benefits solely on the basis of sex is sufficiently questionable that "due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve the interest" put forward by the Government as its justification. . . . In my judgment, something more than accident is necessary to justify the disparate treatment of persons who have a strong claim to equal treatment as do similarly situated surviving spouses.

See also *Fullilove v. Klutznick*, 100 S. Ct. 2758 (1980). (Stevens, J., dissenting); *Mathews v. Lucas*, 427 U.S. 495, 516 (1976) (Stevens, J., dissenting). *See generally* Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 158, 206-32 (1978).

155. For contrasting views concerning both the need for rationality in government decisionmaking and the role of courts in assessing rationality, compare Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049 (1979) with Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

156. *Cf.* Karst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7, 23 (1979):

Any substantive issues are thus relegated to the category of "political judgments" that may be relevant to particular decisions but are unrelated to constitutional principle. Constitutional principle is to be saved, in other words, by submitting it to sterilization. Just how succeeding generations, or even judges in next week's cases, are to find guidance in such a value-free principle is anyone's guess.

157. Ely's analysis, by taking the outcomes of representation-reinforced democracy as conclusively legitimate, places the inherent deficiencies of that democracy beyond effective reproach. As Professor Tribe has noted: "[T]hat domination can appear in the guise of democracy is hardly a novel observation in the late twentieth century. The puzzle is that the failure of process-based theories even to speak to this danger should be so readily and persistently excused or overlooked." Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1079 (1980). Similar concerns have been expressed by Professor Levinson, who, in referring to Justice Holmes' conception of government as primarily a reflection of power, wrote:

not—indeed it cannot—continue to provide a background or context against which moral evolution can take place. By draining the Constitution of its capacity to generate specific moral conceptions, Ely's theory also vitiates its force as a symbolic manifestation of moral ideals. The Constitution can no longer play a meaningful role as a reminder of the possibility of moral perfection.¹⁵⁸

Finally, I would like to suggest some reasons why Ely's theory ultimately may prove too much for even him. His goal seems not to have been to deny the relevance of morality to the evaluation of public policy. Nor does he seem to disagree fundamentally with the view of Professor Dworkin (and others) that there is a necessary "fusion of constitutional law and moral theory."¹⁵⁹ His argument against the view that "moral philosophy is what constitutional law is properly about"¹⁶⁰ seems to be premised in his view that morality cannot be *all* that constitutional law is about. This, in turn, is based on his rejection of the view that there is a "correct way of doing such philosophy" and (even if there were) "that judges are better than others at identifying and engaging in it."¹⁶¹ Moreover, in denying the legitimacy of a judicial review that seeks to fill in the Constitution's open-ended provisions by reference to principles of natural law, Ely concedes the possibility of "reasoning" about ethical issues, but argues that our society properly denies the existence of a "discoverable and objective valid set of moral principles."¹⁶²

It seems to me that one can accept most of Ely's objections to the existence of a "correct" method of doing moral philosophy and deny the existence

One might, in a sense, admire Holmes for his candor, for there is no attempt to hide the fact that the rule of law might be equivalent to tyranny, but it is at this point that we are entitled to ask why law should deserve our respect, why faith in the Constitution should be affirmed rather than questioned.

Levinson, *The Specious Morality of the Law*, HARPER'S, May, 1977, at 38.

158. Those who accept the view that the resolution of short-term principles must be inherently political, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 25 (1962), may well find Ely's theory compelling. It may also be attractive to those who deny the existence of a meaningful distinction between transient or perceived values and those that are ideal, or those who admit the distinction but deny that the gap between the two can be adequately identified, see, e.g., Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1182 (1977), or articulated. See, e.g., Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1007 (1973). But to those who believe that the Constitution does embrace more substantive values than Ely would admit or who believe that, regardless of its particular moral content, the Constitution must serve as a symbol of moral aspirations and a vehicle through which those aspirations might be realized, Ely's theory will be unacceptable.

It is important to note that while this problem is closely related to the questions that permeate the contemporary debate over the appropriate judicial role, it is also independent of them. If the Court were to adopt Ely's theory, its willingness to invalidate legislative outcomes might well be diminished. But assuming that legislators and other government officials take seriously their responsibility to apply and interpret the Constitution, see generally Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Mikva & Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449 (1971), their perception of the Constitution's proper relationship to evolving moral values also should be profoundly affected. While Ely's Constitution is not a place to which the Court can look for substantive moral guidance, it is difficult to see how it can be used by legislators for this purpose. The legislator is thus instructed to regard political power as the ultimate morality and to view the results of power struggles as beyond moral approach.

159. ELY, *supra* note 2, at 58, citing Dworkin, *The Jurisprudence of Richard Nixon*, N.Y. REV. BOOKS, May 4, 1972, at 27, 35 (1972), reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 149 (1977).

160. *Id.* at 56.

161. *Id.*

162. *Id.* at 54.

of a discrete, objective, and immutable set of moral values without accepting his interpretation of the function of the Constitution or of judicial review. As I have argued, the Constitution can properly be understood as a source of moral values without being taken to offer ultimate or permanent resolutions to all moral issues. When it does not clearly or even arguably embody substantive values, it can serve as a touchstone from which those values can be developed. Furthermore, despite the scientific imperfection of its methods, philosophy has always been an inherent component of constitutional analysis, whether undertaken by courts or others.¹⁶³ And the prospect of viewing the Constitution as providing a moral background or organizing force need not entail the view that the document actually contains ultimate and objectively discoverable moral truths whose revelation depends only upon deeper analysis or reflection. Instead, it can be viewed as manifesting our society's somewhat paradoxical belief that moral values as we now perceive them are inherently imperfect and incomplete. If there is a sense in which the Constitution is truly "manifest," it is in the realization that, in its concern for structure and process, it establishes not only a framework for working out changing notions of conventional morality—in Bickel's words, "the constitution of the mechanics of institutional arrangements and of the political process, of power allocation and the division of powers . . ."¹⁶⁴—but also an "idealized conception of how change should be structured."¹⁶⁵ For reasons already suggested, I believe Ely's process-based theory robs the Constitution of its ability to provide such an ideal.

The dilemma of the "political liberal," which Ely so poignantly describes,¹⁶⁶ confronts most contemporary constitutional theorists. We seek to

163. Although there has been considerable agreement on the essential relevance of moral philosophy to constitutional reasoning, there has been considerable disagreement concerning both the appropriate method and timing for its invocation. See, e.g., B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 5 (1977) ("... it is only after resolving certain philosophical issues that one can make sense of the constitutional question, let alone pretend to expound a correct constitutional answer. Philosophy decides cases; and hard philosophy at that."). See also A. BICKEL, *THE MORALITY OF CONSENT* 26 (1975); Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877, 901 (1976); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 *WASH. U. L.Q.* 659; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U. PA. L. REV.* 962 (1973); Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 *HAST. CONST. L.Q.* 263 (1980); Soper, *On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution*, 79 *COLUM. L. REV.* 44 (1979). But see Friendly, *The Courts and Social Policy: Substance and Procedure*, 33 *U. MIAMI L. REV.* 21, 24 n.14 (1978).

I suppose it could be argued that Ely's whole theory is premised on his own conception of moral philosophy. Although he attempts to distinguish "participational values" from those of a more clearly moral and substantive type, ELY, *supra* note 2, at 75 n.*, he derives *that* value from his conclusion that our constitutional democracy is based upon the foundation of consent. Consent, of course, can be viewed in both political and moral terms, as the title to Professor Bickel's final book, *THE MORALITY OF CONSENT* (1975), graphically demonstrates. Moreover, since the Constitution is not explicit concerning the optimum level of participation, Ely's position in that regard may be taken as representing his own moral choice.

164. A. BICKEL, *THE MORALITY OF CONSENT* 29 (1975). For a general discussion of Bickel's view, see notes 85-88 and accompanying text *supra*.

165. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L.J.* 1315, 1338 (1974). See also Tribe, *From Environmental Foundations to Constitutional Structures: Learning from Nature's Future*, 84 *YALE L.J.* 545, 556 (1975).

166. ELY, *supra* note 2, at 72.

reconcile our hopes and visions for a more perfect society with our deep skepticism concerning the darker side of human nature as personified by the unenlightened judge. Ely's way out of that dilemma is to disguise the moral notions of equal concern and respect in the trappings of process and participation. Perhaps the depth of his own moral convictions is most clearly revealed in his failure to succeed with this disguise; his heart may not be squarely on his sleeves but it can be seen conspicuously peeping out of his cuffs.¹⁶⁷ But it is important to consider the risks that such masquerading entails. If it is successful—if a constitutional theory can be constructed that not only demands the moral neutralization of the Constitution but (more) effectively achieves it—the symbolic function of the Constitution in providing an ultimate moral promise and authority for our society will be destroyed. If this comes to pass, the Constitution will be unable to even minimally promote the "facilitation of a more just social order."¹⁶⁸

In this respect, a real value of Professor Ely's theory may be found in its failure to more convincingly demonstrate that the Constitution can or should be perceived in value-neutral terms. Given his impressive credentials as a constitutional scholar, and the enormous professional respect he has earned, one might well wonder if the art of process-theory building can be improved upon. One might also wonder whether constitutional theory might more sensibly proceed in other directions—directions that take account of the problems of institutional role but regard them as subsidiary to the need to respect the Constitution's moral function. If the recent history of constitutional scholarship is any guide, the search for new directions may be slow to come.¹⁶⁹ Instead, no doubt, much scholarly attention will focus on the internal inconsistencies or incoherence of Ely's theory. There will be recommendations for its refinement or abandonment but much approval for its goals.¹⁷⁰ Therein lies the real danger in his work, for it may generate greater interest in the possibilities of value-free theory. But the more we seek value-neutral modes of adjudication, the more neutral the Constitution will become. In the final analysis, a wholly neutral Constitution may not be capable of embracing

167. See Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 671 n.64.

168. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 195 (1978).

As previously noted, I defended my arguments for the recognition of dignitary values in procedural due process adjudication as being consistent with the demands for legitimacy in judicial review. This defense was offered for two reasons. First, I had substantially accepted and internalized the notion that judicial review was essentially anti-democratic and therefore especially vulnerable in any activist form. Second, I believed that, to be taken seriously, any constitutional argument with clear moral implications had to be "cleansed" by being capable of inclusion in a value-neutral theory. I suspect that my attempt at disguise proved too thinly veiled for many. *But see* *People v. Ramirez*, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979). In any event, after my Article had been published, I felt a strong sense of dissatisfaction with my attempt to "cleanse" my moral argument. I have now attributed that feeling to the realization that the more success one achieves in mastering and refining the art of constitutional theory, as described at the beginning of this article, the greater the risk one must face that the ability of the Constitution to perform its moral organizing role will be diminished.

169. *But see*, e.g., C. BLACK, HOLMES LECTURE (1979) (tentative draft); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 5-17 (1979).

170. *See*, e.g., Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1421-37 (1979); Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1041-50 (1979).

equal concern and respect. It may be unable to embrace anything but power itself.¹⁷¹

C. *Some Practical Costs of Constitutional Theory As Revealed
by the Experience of Teaching Constitutional Law*

Related to the rather abstract argument I have made concerning the costs of constitutional theory, there is a more practical and concrete observation I would like to make. When I began teaching constitutional law, I was persuaded of the need to impress upon my students that Supreme Court decisions could not be evaluated solely, or even primarily, in moral terms. Convinced of the threat that result-oriented jurisprudence posed for the lofty ideal of a government of laws and not men, I emphasized the importance of searching for "principled" modes of decisionmaking.¹⁷² Assuring them that their realist inclinations were overly simplistic and cynical, I showed them why natural law theory was so disreputable and why legal realism simply wouldn't do. I encouraged them, at the very least, to seek justification for their personal views concerning the validity of constitutional doctrine through the technique of "reasoned elaboration."¹⁷³ Methodology was my forte, theory was my passion.

In many ways, the results of these efforts over these last five years have been sobering. I have found that, for the most part, students begin their study of constitutional law with a special kind of energy and enthusiasm. They see constitutional law as especially "relevant" to their lives. They look forward to discussing the issues of abortion, affirmative action, and the like because they see these issues as morally charged and intellectually provocative. They anticipate stimulating debates with their classmates concerning the moral nature of the Constitution and how that fundamental morality should inform their personal preferences. But their forced immersion in constitutional theory profoundly alters their excitement. They become afraid to speak of morality in the same breath as constitutionality. They come to believe that the results of constitutional decisions can be evaluated only according to concepts of legitimacy, institutional competency, processes of decisionmaking, and the like. Time and again, when I ask students to put their books away and

171. This realization is implicit in the following observation by Professor Leff:

As long as the Constitution is accepted, or at least not overthrown, it successfully functions as a God would in a valid ethical system: its restrictions and accommodations govern. They could be other than they are, but they are what they are, and that is that. There will be, as with all divine pronouncements, a continuous controversy over what God says, but whatever the practical importance of the power to determine those questions, they are theoretically unthreatening. It is only when the Constitution ceases to be seen as fulfilling God's normative role, ceases, that is, to be outside the normative system it totally constitutes, or when, as is impossible with a real God, it is seen to have "gaps," that a crisis comes to exist. What "wins" when the Constitution will not say, or says two things at the same time?

Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1247.

172. The extent to which similar inclinations are shared by other constitutional law professors is manifested by the growing popularity of Professor Brest's casebook. In this regard, Professor Monaghan's review of that book is of interest. Monaghan, Book Review, 90 HARV. L. REV. 1362 (1977).

173. See generally G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT 136-63 (1978).

engage in a discussion concerning how they *feel* about the Court's decision in *Roe* or *Bakke*, some typical responses I get are these: *Roe* is or is not *Lochner* incarnate;¹⁷⁴ the Court's analysis in *Roe* is or is not "principled"; Justice Powell was or was not correct in refusing to apply "footnote four" methodology in analyzing the preferential admissions program challenged in *Bakke*,¹⁷⁵ and diversity should or should not be considered a compelling state interest.

These kinds of reactions would, of course, be appropriate in response to a professorial instruction to apply the "tools of the lawyer's trade." But they are offered as indications of how students *feel* about the moral dilemmas that these difficult issues present. The same students who are *eager* to express their moral or ethical views on these issues at the beginning of the course become *afraid* to express such reactions once their immersion in constitutional theory is effected. They come to see moral questions as largely beyond the pale of legitimate judicial inquiry.¹⁷⁶ More importantly, however, they come to regard the Constitution as largely useless in moral debate. Since much contemporary theory tells them that few constitutional provisions have sufficient specificity to serve as objective symbols of a constitutional morality,¹⁷⁷ and that absent such specificity only the morality of process and politics can count, students come to see political power as the ultimate morality.

There are, of course, potential explanations for this phenomenon, explanations that are extrinsic to theory itself. But I have found my experi-

174. Cf. G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 603 (10th ed. 1980) (asking "Is *Roe* distinguishable from *Lochner*?").

175. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290-91 (1978) (Powell, J.).

176. Because of theorists' preoccupation with legitimacy, this fear of moral argument may be inevitable. See R. DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977) ("It is perfectly understandable that lawyers dread contamination with moral philosophy, and particularly with those philosophers who talk about rights, because the spooky overtones of that concept threaten the graveyard of reason."). Moreover, once developed, it is difficult to counteract. It becomes an inherent part of how many students think about law, legal institutions, and professional roles. This realization has been impressed upon me through the use of an exercise I have conducted at the beginning of an advanced constitutional law seminar I have taught for the last several years. I have assigned student teams to argue both sides of contemporary and particularly controversial constitutional issues—such as the constitutionality of state statutes requiring sterilization of institutionalized, mentally retarded women. I have also assigned several students to act as judges. Invariably, student arguments have been devoid of any overt appeal to moral values. Instead, arguments have been presented solely in terms of interpretation of precedent and appeal to alternative methodologies for decision. Similarly, the student-judges have strained to avoid asking questions intended to elicit moral reaction or argument. In subsequent discussions with the student-actors, I have inquired as to whether the failure to appeal to or integrate moral argument in their presentations represented a conscious choice. Their typical responses have been that, while *they* viewed the issues in profoundly moral terms, they believe that any formal appeal to the fairness, justness, etc. of the government action would be regarded by a court as wholly irrelevant to a proper disposition of the case. Instead, they believed it imperative to conceal moral argument—to camouflage it under the rubric of a more principled appeal to precedent and standards of review. This response has been the same from both "lawyers" and "judges." Moreover, it is invariably accompanied by a deep sense of self-consciousness and even guilt.

177. A particularly suggestive example of this phenomenon is the response my students have often given when asked to assess the merits of Justice Marshall's "sliding scale" standard for equal protection analysis. See note 75 and accompanying text *supra*. Although many express dissatisfaction with the rigidity and formality of multi-tiered analysis, they generally refuse to give serious consideration to a more sensitive analysis because of its potential fluidity and manipulability. The point here is *not* that Marshall's proposal represents "ideal" theory, but that it often is assumed to be beyond the scope of intelligent discussion. One gets the feeling that this same reaction has prevented a majority of the Justices from moving beyond multi-tiered analysis despite their published dissatisfaction with it. See, e.g., Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

ences to be sufficiently typical of those of other constitutional law professors¹⁷⁸ to exclude either the deficiencies of my teaching methods or of my students' abilities as the sole causative factor. Instead, I believe this phenomenon is attributable to an inherent deficiency in the direction of constitutional theory, and that it must be understood as both unfortunate and avoidable. In writing about the "virtue of constitutional republics," Professor William Bennet made some observations that I believe bear repeating:

I believe we misallocate our resources and energies if in teaching about constitutionalism we neglect to talk about the "ordinary" values citizens—our students—must have in daily commerce with each other. We often neglect this for the sake of talking about constitutionalism and great dissents; we talk about nifty ways to put together arguments extending the Fourteenth Amendment into new areas when students with whom we are working are at a point where they believe some or all of the following spectacularly unrepugnant notions: that all values are subjective; that all questions of right reduce to questions of power; that the Constitution is not primarily an order or structure for fair dealing and for providing justice "for friends as well as enemies" but is a bludgeon to be used to beat the unregenerate, the big, and the powerful into submission. It seems to me that the spirit of constitutionalism requires, perhaps primarily, a commitment to the possibility of citizens' reaching sound conclusions about right and wrong through the deliverances of judgment and sound principle, and the commitment to responsible action on that basis. . . .¹⁷⁹

In concurring with these observations, I would add that their significance should not be lost on scholars and judges. I have argued that the Constitution, properly conceived, must be viewed as the fundamental moral organizing force in our society, that it serves as the background or context against which moral dialogue and debate should take place. This does not mean that the Constitution itself—in terms of its words, structure and history—is or can be our only source of morality. Nor does it deny that, as a source of particular moral conceptions, the Constitution's guidance may be unclear. Although I believe that the concern and debate over questions of legitimacy and institutional competency are relevant to the proper evolution of constitutional law, I also believe that these questions are subsidiary. If they continue to consume constitutional theory, they will detract from the Constitution's ability to serve as a needed reference point for the development and refinement of our public morality, a function that I regard as essential to the stability and enlightenment of our moral order.

178. The phenomenon of which I speak is, of course, not confined to the study of constitutional law. The debate about whether legal education as generally practiced in this country is "dehumanizing," and whether this should be regarded as either inevitable or even undesirable, has been raging for years. See, e.g., S. THURLOW, ONE L (1977). Compare J. SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL (1978), with Cox, Book Review, 92 HARV. L. REV. 1170 (1979).

179. Bennett, A Comment on Cecelia Kenyon's "Constitutionalism in Revolutionary America," in CONSTITUTIONALISM: NOMOS XX 210, 213 (J. Pennock & J. Chapman eds. 1979).

IV. THE VALUE OF CONSTITUTIONAL THEORY

Thus far, my main concern has been to emphasize that the contemporary practice of constitutional theory, as most prominently illustrated by the development of equal protection methodology and the work of Professor Ely, has presented a serious threat to the Constitution's capacity to perform its most important functions. Preoccupation with the judicial role and attendant efforts to objectify and amoralize the judicial process have elevated theory to a transcendent position vis-à-vis substance. A major feature of this development has been the growing perception that the value of theory is primarily intrinsic. That is, theory is important, not because it provides us with an effective way of using the Constitution as a moral force in our society, but because it provides a substitute for such a use.

There are a number of reasons why this conception of theory has become increasingly popular. Much constitutional doctrine has proven to be both ambiguous and fluid. The composition of the Burger Court has remained relatively stable over the last decade and, at least in some important areas, its differences with the Warren Court have become more pronounced.¹⁸⁰ In other areas, the direction of the Court remains unclear, with a number of doctrinal areas in a state of flux.¹⁸¹ Moreover, the prospect of a substantial change in the Court's membership in the next few years creates a sense of impermanence in the Court's current doctrine. These factors, when combined with the ongoing academic debate concerning the desirability and possibility of internal order and coherence in law and the lingering influence of realist assumptions concerning the inherent subjectivity of the judicial process, have created increasing doubt about the possibility of discoverable and realizable rules and principles. In constitutional law, the common belief in the dispositive authority of the Constitution has come into increasing tension with the equally common perception that the constitutional text is not exhaustive of

180. For a general discussion of major areas of similarity and difference in constitutional doctrine in the Warren and Burger Courts, see CHOPER, *supra* note 1, at 91-122. See also Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HAST. CONST. L.Q. 263 (1980); Van Alstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROB. 66 (1980).

181. An overview of the Burger Court brings one to the conclusion that this is a Court in which no one ideology or philosophy prevails on a regular basis. It is a Court in which competing forces exist side by side. Nixon's appointees have created a strong force for conservative values. Lessons learned in the sixties, however, are not quickly unlearned. Activist techniques, once employed, are available to be used again. . . . The fluid voting patterns emphasize the competition between the voices of caution and the neo-Warren bent for action.

Howard, *The Burger Court: A Judicial Nonet Plays the Enigma Variations*, 43 LAW & CONTEMP. PROB. 7, 27 (1980).

No doubt, the eclecticism of the Burger Court, when contrasted with the general equalitarian theme of the Warren Court, has been a major reason for the increasing importance Court observers place on the need for more coherent constitutional theory. Professor Howard has noted that "Since the departure of the great ideologues, the justices are under less pressure to fit individual cases into doctrinal tableaux." *Id.* at 25. This pressure has increased for the academic commentators, however, whose self-defined mission is not to decide actual cases but to make doctrinal sense of them. For an idea of how difficult this task has been, even for some of our most respected scholars, see the articles collected in *The Burger Court: Reflections on the First Decade*, 43 LAW & CONTEMP. PROB. 1-135 (1980).

fundamental norms of governance. Clearly, though, the further outside or beyond the document we move in search of unwritten doctrine, the more we doubt that what we find is real.

One way to resolve doubt concerning the legitimacy of unwritten doctrine is to establish with precision and clarity the path we took to uncover it. As the description of this path becomes more objective and concrete, our concern for the true existence of what it produces diminishes. Thus, the internal order and coherence that we find missing from unwritten doctrine is supplied by the order and coherence of the methodology that produces it. Although the doctrine itself may appear elusive and incoherent, the theories that produce it are capable of being rationally analyzed and debated. In this way, the models of decisionmaking we create—for example, interest balancing, means scrutiny, disproportionate impact analysis, “footnote four,” and the like—supply the objectivity, discoverability, and independent vitality that substantive doctrine lacks. Additionally, since the architects of theory cannot fairly be asked to assume responsibility for its (mis)application by others, it is more sensible and sporting to evaluate the doctrine that a theory produces in terms of what it tells us about the theory, instead of looking at the matter the other way around. Given this perception of theory, it is little wonder that the content and quality of substantive doctrine has been assessed primarily in symptomatic and instrumental terms.

It seems to me that this approach stands constitutional theory precisely on its head. The value of a theory should be assessed in instrumental terms. What kind of decisions has a theory produced? What decisions is it likely to produce? Do those decisions comport with moral conceptions that are derivable from the Constitution as textually and historically understood? Do they comport with contemporary or conventional notions of morality read in light of the moral ideals to which our society has committed itself and towards which it professes to move? Do the results that a theory produces reflect a tolerable accommodation between the tensions that such a three-dimensional (past, present, and future) analysis will inevitably entail? Or does a theory’s attention to questions of structure and process and institutional competence and role tend either to obscure or render superfluous the moral stature of doctrine?

I recognize that this analysis suggests the danger of a return to the much discredited notion of result-oriented jurisprudence, and that it fails to offer a set of principles against which results can be measured. In my view, however, the identification and elaboration of principles for decision, whether neutral or otherwise, is a matter of admitted but secondary importance. I do not suggest that we must fatalistically accept any constitutional decisions that a court might reach, or that it is not useful, desirable, or possible to disagree about the validity of the moral conceptions upon which a judicial decision has been based. Nor do I argue that questions of judicial competence and role are irrelevant to a decision’s legitimacy: clearly there are some decisions as to which either court or legislature should (not) have the final say. What I do

mean to argue is that the substantive morality of a constitutional decision must always be a necessary and legitimate condition for its authority and acceptance, regardless of whom we entrust with its final determination. If we refuse to confront the question of the morality of public policy—as much contemporary theory requires or encourages us to do—we will pay a heavy price: we must be prepared to foreclose or diminish the Constitution's value as a moral repository; we must be prepared to accept politics and power as the final source of moral values; and, perhaps most importantly, we must be prepared to accept the diminished significance the Constitution will have as a symbol of moral legitimation and the possibility of moral perfection. It has been the thesis of this Article that this price is too heavy to pay.

What, then, is the value of theory to the practice and prospects of constitutional law? If the search for better theory cannot be the exclusive concern of constitutional scholarship, can it play a constructive and facilitating role in the development of morally sensitive doctrine? The answer is that theory's importance lies in its capacity to inject perspective, direction, and stability into constitutional and moral evolution. Whether engaged in by judges or others, unchanneled moral sensitivity may be both inherently chaotic and counterproductive. Theories can provide structure for moral understanding that both deepens and expands its importance to our lives.¹⁸² Judicial sensi-

182. Perhaps this conception of the value of theory can be better visualized in metaphorical terms. The Constitution, as a repository of moral values and a moral organizing force, can be portrayed as an endless garden of beautiful colors and textures. The garden's vastness is both its blessing and curse. It is a blessing because it offers an infinite source of beauty and pleasure. It is a curse because the pervasiveness of its beauty threatens to deny us a needed perspective: when beauty cannot be contrasted it is robbed of much of its significance. Thus, in order to maximize our ability to appreciate the garden, it might be desirable to make a path and enclose it between two walls. The walls enhance our ability to appreciate the garden's beauty in two ways. First, they temper the distorting impact of its vastness. By removing part of the garden from view, the walls force us to focus on and consider the beauty and value of only a few flowers at once. Second, they function as a guide for our journey through the garden. They prevent us from wandering far from the path and minimize the attendant risk of undifferentiated beauty. By enclosing the garden path in walls, we are left to wonder whether the beauty we see is all the beauty that can be realized. The walls force us to appreciate what we have and help us retain hope that the garden can be even more beautiful. At the same time, however, we must realize the potential risks we face by building walls. First, we may come to see them as marking the outside boundaries of the garden instead of marking only a path. If this view prevailed, the joy experienced in viewing the beauty of the flowers we see would be diminished by a perception that no other beauty existed. Second, we might become dependent on the walls, concentrating on them to the exclusion of what they embrace. The more the walls occupy our attention, the less will be our appreciation of the beauty that lies within them. Ultimately, then, what we must seek to develop is a balanced perspective. We must appreciate the flowers we see in light of both their intrinsic value and our anticipation of the garden beyond. We must view the walls as guides through the garden we can see as well as symbolic of the garden beyond. Although we may conclude that no perfect balance between the two exists, we cannot afford to stop searching.

The relationship between the substantive content of constitutional law and the role of constitutional theory is very similar. The Constitution can be viewed as an endless repository of values that inform our perceptions of ourselves and our society. Those values define our vision of what we are and should be. As in the case of the garden, they represent an infinite array of moral conceptions that symbolize what we have been and what we hope we can be. If all the Constitution's values are visible at once, our ability to fully appreciate the real beauty of any one of them would be severely restricted; our ability to choose among conflicting values will also be diminished. To respond to this problem, we might find it desirable to construct different constitutional theories. As in the case of the garden walls, these theories may enhance our ability to appreciate constitutional values in two ways. First, by focusing our attention on fewer values at one time, a theory may help us probe a particular value more deeply than we otherwise might. In this process of deep reflection and evaluation, we may come to understand the value more intimately and maximize our appreciation of its meaning for our lives. Through this

tivity to moral values may have attracted more condemnation that it deserves; sensitivity that is channeled may be a source of strength instead of weakness.¹⁸³ Instead of aspiring to theories that actually blind the judge's ability to perceive and reconcile the world as it is and as we hope it can be, we should recognize that, like the judicial restraint that it has sought to foster, theory is "on the one hand, a condition of the mind and, on the other, a response nurtured by tradition and expectations, in either event unforceable by mechanical rules or labels."¹⁸⁴

Constitutional theorists have been operating under the false assumption

process of reflection, we may be better able to determine the value's proper relationship to others around it. Second, constitutional theory can serve as an important vehicle for refinement and evolution of values we now hold. By helping focus our attention on these values, a theory can enhance our sensitivity to the beauty we see as well as expand our awareness that greater perfection is possible: it can remind us that what we see may not be all we can get.

The same risks attend the construction of theory that were associated with the construction of garden walls. We may come to see a theory (or theories) as making the outside boundary of constitutional values, thus diminishing their capacity to change and evolve. Further, we might become so dependent upon and preoccupied with theory that we lose our ability to appreciate and understand the values they embrace.

At considerable risk of straining a metaphor, I believe that the efforts of some contemporary theorists such as John Ely should serve as reminders that these risks are quite real. By seeking to minimize judicial participation in the elaboration of moral values, Ely has constructed walls around the Constitution that have obscured its moral content. Instead of channeling or focusing our attention to particular moral values, Ely argues that few substantive values really exist. Ely's self-consciousness in this regard is evidenced in a footnote. *See* ELY, *supra* note 2, at 92 n.* ("[I]m not sufficiently sadistic to list all the provisions that are obviously concerned only with process.") Thus, the theory he offers is intended to fully occupy the reader's attention, disabling her capacity to think of the Constitution in substantive terms.

183. This argument may seem circular, at least to the extent that it is relevant to ask what sort of channeling is appropriate. If it is, I'm not so sure that some circularity in constitutional law can or should be avoided. It doesn't take a lifetime of reflection to realize that no perfect or singularly valid constitutional theory can exist. Nor does it take a lifetime to begin to realize that, like morality itself, the phenomenon of theory must constantly evolve. What is surprising is that for many—including myself—it takes so long to realize that, in the final analysis, the morality of reality, not theory, is what really counts.

No doubt, the debate concerning which morality is more important will continue with intensity. Like the debate over particular theories, this broader contest surely has its own value. Consider, in this regard, two recent examples of this debate:

The Supreme Court does advance democratic values by rejecting political action that threatens individual liberty. Its rulings requiring popular policies to adhere to constitutional precepts do enhance the democratic nature of our society. But irrespective of the *content* of its decisions, the *process* of judicial review is not democratic because the Court is not a politically responsible institution. . . .

Although the Supreme Court may play a vital role in the preservation of the American democratic system, the procedure of judicial review is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom.

CHOPER, *supra* note 1, at 9–10 (footnote omitted).

[I]n highest level abstraction, the need is for a teleological jurisprudence, one goal-seeking and purposive in nature. Judicial thought should ultimately be in terms of consequences, of results and of alternative decisions. This is not a bold-faced plea for results in accordance with who the litigants are.

The task of the Court is to further the democratic ideal.

Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HAST. CONST. L.Q. 487, 505 (1979).

184. Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. REV. 765, 782 (1973). The authors went on to argue:

In this light, each Justice and the Court as an institution must decide on the meaning of the fourteenth amendment in a context of felt tension between acute recognition of the anti-democratic implications of judicial review of legislation—at least where the words of the Constitution are vague—and awareness that no constitution could list specifically all the social values that are so deeply prized and widely shared in our society that we have come to expect barriers to their easy defeat by legislative majorities.

Id. at 782–83 (footnote omitted).

that an ideal theory is either realizable or desirable.¹⁸⁵ Instead, it is the spectrum of theories that provides the vitality and flexibility that is so necessary for the development of viable constitutional doctrine.¹⁸⁶ In this sense, the ultimate value of *Democracy and Distrust* may lie in the responsive theories that it encourages rather than in its intrinsic power or persuasiveness. Professor Ely has offered his own conception of the Constitution and the Court for public consideration and evaluation. But perhaps more importantly, the "modesty"¹⁸⁷ of his theory offers a challenge to those who think, as I do, that the Court and the Constitution can and should play a more meaningful role in the development of a more just social order.¹⁸⁸ Although he has made the search for truth in constitutional law no less elusive, he has helped instill a renewed sense of challenge and excitement for those of us who still believe that the searching matters at all.

V. THE FUTURE OF CONSTITUTIONAL THEORY

In thinking about the future of constitutional theory, I find informative the view expressed recently by Professor Gunther, one of the most distinguished theorists of our time:

Far more important than the result-oriented critics are those academics who

185. Professor Levinson's observation bears repeating here:

It is unlikely, moreover, that any of the participants in the debates about constitutional theory are going to have their minds changed by reading a polemic by a person of another sect, any more than Baptist theologians are likely to convert to Catholicism or vice versa when presented with a "refutation" of the other's position.

Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123, 150.

186. If it is fair to say that no particular theory can ever be regarded as ultimate, and that any theory's value should not be measured in primarily intrinsic terms, it might also be said that the adaptation of any theory for the resolution of constitutional cases—whether in a single case or over a period of time—is essentially arbitrary. Given the fact, however, that the Constitution often fails to resolve hard cases by its own terms, it is not clear why the arbitrariness of any particular theory should cause us much concern. Professor Leff, in an extraordinary article, has spoken to this issue in a way that I find compelling:

The Constitution as God says, in effect, that one wins out over the other when it, the Constitution, says so, and not when the individual or the group says so. But what then can one do when the Constitution, quite obviously, says nothing at all?

Along with John Ely, one can say that in those cases the collective wins, but only if it sticks to certain processes for its own activities, notably those designed to keep the political process open. Or, like Michael Perry, one can try, whenever the crunch comes, to discover some deep beliefs of "the people" that are not, for some reason, accurately reflected in the political process. With Alexander Bickel one can look to stable traditions, or with Laurence Tribe to substantive intuitions. The point is, one must be arbitrary in locating the ultimately, unchallengeable arbiter of evaluations, if the two specified by the applicable God, in this instance the Constitution, do not in fact agree. To put it concisely, if the applicable God is going to insist upon being incoherent, we really have no choice but to be arbitrary.

Leff, *Unspeaking Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1248-49 (footnotes omitted). Perhaps in this sense, constitutional theory as a discipline can be perceived as possessing special intrinsic value.

187. Professor Michelman has referred to Professor Ely's work as "the most conservative, restrained theory of transcontractualist constitutional interpretation I know of. . . ." Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 666.

188. For the first of these responses, see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

Of course, Ely's work will also provide a catalyst for those who believe that his conception of the judicial role is too broad. For early signs of such criticism, see, e.g., Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361 (1979).

worry seriously about the legitimacy of newly created constitutional rights. Perhaps I am being unduly parochial and academic as well as naive, but I am heartened by the extraordinary recent phenomenon of more serious and extensive worry in the literature than in any earlier period of my professional career. There is an outburst of writing about legitimate modes of constitutional interpretation and about limits on judicial subjectiveness and open-endedness. . . . John Ely and Frank Michelman at Harvard, Paul Brest and Tom Grey of my faculty—able scholars such as those—are worrying more seriously than ever about the permissible content of constitutional adjudications on the merits.¹⁸⁹

Although Professor Gunther's perception that concern for legitimacy and the judicial role has been absent in recent constitutional scholarship strikes me as somewhat curious, his observation that increasing attention is being given to these issues is clearly correct. I tend to disagree, however, with his view that "the dramatically reviving interest in legitimacy must surely be a welcome development."¹⁹⁰ My concern for this development is based upon several factors. First, it may be that the concern for legitimacy is inherently insatiable; it is not clear that traditional notions of legitimacy can be reconciled with a constitutional theory that has the capacity to be meaningfully responsive and sensitive to the morality of doctrine. It seems to me that as long as the notion persists that moral values are inherently subjective, and as long as scholars and jurists continue to view subjectivity as antithetical to a legitimate theory of judicial review, there can be no adequate reconciliation of theory and substance in constitutional law.¹⁹¹

A second basis of concern for the increasing attention to legitimacy is the way in which legitimacy itself is often measured. Judicial review is generally assessed in terms of the accountability and responsiveness of life-tenured judges when measured against that of legislative and executive officials. Although some political controls operate on the selection of federal judges and the conduct of their business, these generally have been viewed as insufficient to justify the creative aspects of judicial decisions. Absent a constitutional amendment, the political structure of the federal courts upon which prevailing notions of democratic theory are premised is not likely to change. Unless there is some change in the traditional conception of democratic theory, which has presumed policymaking to be a non-judicial prerogative, there is little reason to believe that models of judicial review that can account

189. Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 WASH. U. L.Q. 817, 827-28.

190. *Id.* at 828.

191. The pervasive criticism of Professor Dworkin's book, R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), suggests the continuing unwillingness of constitutional scholars to accept the possibility that morality can be sufficiently objective to play a role in constitutional adjudication. For examples of such criticism, see articles collected in *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1977). See also Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1386-92 (1979); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1166-72 (1977). Professor Charles Fried, one of the few prominent scholars to endorse generally Dworkin's conception of the interrelationship between law and morality, has argued powerfully, and I believe persuasively, that moral propositions are sufficiently "objective" and moral argument sufficiently "correct" to be accepted as legitimate, if not inevitable, components of legal judgments. Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980).

adequately for the moral nature of the Constitution will be widely perceived as legitimate.¹⁹²

Professor Tushnet has described recent developments in constitutional theory in the following terms: "Contemporary constitutional theory is developed by people who see that the emperor has no clothes, who say so in oblique ways, but who are uncomfortable enough with their perception to search for new emperors; theory is applied by people who seek to be the emperor's tailors"¹⁹³ Borrowing from his metaphor, I believe the search for legitimacy has represented an attempt to dress the justice as emperor in a coat of iron, out of fear that less sturdy garb could be too easily shed. Given the Court's historic practice of treating the Constitution as both a source of written and unwritten moral values, and the inevitability of that practice under a Constitution that is to serve the function of moral legitimation, it may be time to come to terms with the idea that more gossamer apparel is both preferable and more natural. Although there have been some notable exceptions, the Court has generally eschewed extreme positions with regard to its own perception of its role as an active participant in the process of identifying and nurturing our moral values and aspirations. Perhaps the centrist position is destined to be the most enduring; perhaps it will prove to be the most congenial to the development of a just and stable political order. If this is so, the ongoing debate between theorists who measure morality in terms of legitimacy and those who measure legitimacy in terms of morality may create a tension that is conducive to a healthy future for constitutional doctrine. In assessing and contributing to this tension, however, theorists would do well to remember that the unfettered search for legitimacy—for purity in the search for an objective and principled basis for judicial review—may be as costly to the ability of the Constitution to serve its moral function in our society as would an approach whose sole concern was the unabashed quest for fundamental values.

192. There are some theorists who have begun to focus more on the unique function judicial review should play in resolving claims of individual rights than on conceptions of the limitations imposed on courts by some rigid, theoretical notion of democracy. See, e.g., CHOPER, *supra* note 1; M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY* (draft, 1980); Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 9-17 (1979). I regard these approaches as more consistent with a proper notion of constitutionalism than those taken by process theorists such as Professor Ely.

There are, of course, other perspectives on legitimacy that deserve more scholarly attention. One such approach has been taken by Professor Deutsch, who has argued that

the searching dialogues forced upon judges by the institutions of the judicial opinion and conference render judicial entities such as the Supreme Court more likely than other political bodies to arrive at trustworthy choices. . . . It is, however, the aspect of the Supreme Court's work embodied in these dialogues, rather than Professor Ely's dichotomy between process and substantive choices, that legitimates the imposition of the Court's political choices upon the society at large.

Deutsch, *Harvard's View of the Supreme Court: A Response*, 57 TEX. L. REV. 1445, 1448-9 (1979). For another, somewhat unorthodox approach to the legitimacy issue, see G. WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 153-63 (1978).

193. Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345 (1979).

Finally, as we move into the post-*Democracy and Distrust* era, I think it important to keep in mind what I take to be a basic truth of American constitutionalism, recognition of which has been central to the ideas expressed in this Article. The continued search for perfection in our national development—perfection measured in terms of justice, fairness, compassion, and respect—as well as stability and efficiency—is dependent upon the active participation and cooperation of all our governmental institutions. An unduly restricted judicial role will impede and distort our moral evolution as profoundly as would comparable limitations on the prerogatives of our more political institutions. When concerns for legitimacy, which are largely motivated by fear and suspicion, undermine the capacity of courts to be active participants in our moral growth, the most important and lasting costs will be measurable, not in terms of the thwarting of any particular conception of moral values, but in terms of the value of the Constitution itself.

CONCLUDING COMMENTS

In this Article, I have suggested that much constitutional scholarship has tended, in evaluating new approaches to constitutional theory, to ignore the forest for the trees. That is, we have become so preoccupied with the advancement of particular theories that we have lost sight of some important issues raised by theory itself. To a large extent, this Article has represented a different approach to constitutional scholarship than I have attempted to date, and it seems to me to have been quite different from the scholarship that it addresses. I have not attempted to offer a particular conception of judicial review, nor have I sought to elaborate and defend a substantive constitutional principle that should inform constitutional adjudication. Instead, I have suggested that the traditional and contemporary efforts of constitutional theorists to sketch and defend particular theories of judicial review have—through their pervasive concern for the issues of judicial competence and role—lost sight of the most important functions to be served by a constitution in our society. I have argued that, although constitutional law is properly concerned with matters other than substantive moral values, it must at least be concerned with such matters.

In discussions with some of my colleagues and students, I have been asked whether legitimate scholarship should do more than offer criticism of theory, and, if so, whether the views expressed in this Article can be regarded as constructive. Is it fair or useful to argue that the Constitution does and should serve as a “moral organizing force” in our society unless one is prepared—perhaps by offering one’s own theory—to respond to the question, “Yes, but whose morality”? In other words, is it useful to talk about the Constitution as a moral force unless one can provide either an excuse or justification for *Lochner* or *Roe*? For a while, these questions bothered me. I have concluded, however, that they should be of secondary concern to constitutional scholarship. What I have argued in this Article is that there *is* a more

important question in constitutional law than that of judicial role. There are more important concerns than whether morality can be objective or objectified. Because of the prevailing assumption that morality is not objective and because of the seemingly insurmountable skepticism that, in a relative world, any particular conception of morality can be "better" than any other, scholars and jurists have often tended to view the morality of political decisions as beyond the scope of legitimate constitutional argument and debate. As a result, at least in many areas, the ultimate morality has become that of politics itself.

It seems to me that we have begun to confuse the intractability and elusiveness of moral judgments with the very possibility and desirability of making them. Moreover, if the Constitution is to serve as a moral force in our society, if it is to serve as a crucible (if not an anchor) for moral dialogue, we must escape the fear that has gripped us in thinking about the possibility that particular moral judgments under the Constitution are not the only ones that could have been made. We must *use* the Constitution as a background against which moral argument can take place. When judges, acting within their traditional function, respond to "the deep and durable demand for justice in our society"¹⁹⁴ by drawing conceptions of morality from the Constitution, we must and should be prepared to analyze and criticize their conceptions. The process of decision and criticism will surely help facilitate the realization of our moral potential. If however, we deny the role of morality in the judicial process, if we continue to insist on the structuring of constitutional theories that are designed to amoralize that process, we will have gone a long way toward rendering the Constitution useless to perform its most important role.

194. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976).

